

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2156

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates Pension Plan, individually and on behalf of all other persons and shareholders of Great Atlantic & Pacific Tea Co., Inc. who are similarly situated,

Plaintiff-Appellant,

- against -

W.J. KANE, H.J. BERRY, R.M. BROWN, JR., W. CORBUS, D.K. DAVID, H.C. GILLESPIE, J.S. KROH, E.A. LE PAGE, R.F. LONGACRE, M.D. POTTS, J.M. SCHIFF, P.A. SMITH, H. TAYLOR, JR., E.J. TONER, W.I. WALSH, N.F. WHITTAKER, J.A. ZEIGLER (all of whom are officers and directors of Great Atlantic & Pacific Tea Co., Inc.), and GREAT ATLANTIC & PACIFIC TEA CO., INC., and C.G. BLUHDORN and GULF & WESTERN INDUSTRIES, INC., and KIDDER PEABODY & CO.,

Defendants-Appellees,

RACHEL C. CARPENTER,

Appellant.

JOINT APPENDIX

MILTON PAULSON

Attorney for Appellant

122 East 42nd Street

New York, New York 10017

697-0133

FRED LOWENSCHUSS ASSOCIATES

Attorney for Plaintiff-Appellant

2 Penn Center Plaza

Philadelphia, Pennsylvania 19102

(215) LO 3-0606

and

ABRAHAM E. FREEDMAN

Attorneys for Plaintiff-Appellant

346 West 17th Street

New York, New York 10011

929-8410

(Continued on next page)

(7717)

LUTZ APPELLATE PRINTERS, INC.

Law and Financial Printing

South River, N. J.

(201) 257-6850

New York, N. Y.

(212) 565-6377

Philadelphia, Pa.

(215) 563-5587

Washington, D. C.

(202) 783-7288

PAGINATION AS IN ORIGINAL COPY

SULLIVAN & CROMWELL

*Attorneys for Defendant-Appellee
Kidder, Peabody & Co.*

48 Wall Street

New York, New York 10005

952-8100

SIMPSON, THACHER & BARTLETT

*Attorneys for Defendants-Appellees
Gulf & Western Industries, Inc.
and C.G. Bluhdorn*

One Battery Park Plaza

New York, New York 10004

483-9000

TABLE OF CONTENTS

Joint Appendix

| | Page |
|--|------|
| Docket Entries - Southern District of New York | 1a |
| Docket Entries - Eastern District of Pennsylvania | 6a |
| Complaint (Filed May 7, 1973) | 8a |
| Tender Offer to Purchase Common Stock of A. & P. | 17a |
| Gulf & Western Notice of Motion to Dis- miss (Filed June 14, 1973) | 18a |
| Affidavit of John A. Guzzetta in Support of Motion (Dated June 13, 1973) | 20a |
| Exhibits Annexed to Foregoing Affidavit of John A. Guzzetta: | |
| Exhibit A - Complaint | 30a |
| Exhibit B - Petition to Intervene and/or File Brief Amicus Curiae | 39a |
| Exhibit C - Affidavit of Fred Lowen- schuss in Support of Petition | 44a |
| Exhibit D - Brief Amicus Curiae on Behalf of Tendering Shareholders of A&P | 51a |

Contents

| | Page |
|--|------|
| Kidder Peabody & Co. Notice of Motion to Dismiss (Filed June 22, 1973) | 66a |
| Notice of Motion to Dismiss of A&P and Officers and Directors of A&P (Dated June 21, 1973) | 68a |
| Plaintiff's Notice of Cross-Motion for Summary Judgment (Filed June 29, 1973) | 70a |
| Affidavit of Fred Lowenschuss in Support of Cross-Motion | 72a |
| Stipulation and Order Discontinuing Action as to Certain Defendants (Filed July 16, 1973) | 81a |
| Opinion of District Court Dated July 25, 1973 | 83a |
| Letter Dated July 30, 1973 to Hon. Kevin T. Duffy | 100a |
| Plaintiff's Notice of Motion for Reargument (Filed August 3, 1973) | 103a |
| Affidavit of Jay Moss in Support of Foregoing Motion | 106a |
| Exhibit A - Stock Order Annexed to J. Moss Affidavit | 108a |

Contents

| | Page |
|---|------|
| Affidavit of Fred Lowenschuss in Support of Foregoing Motion Dated July 30, 1973 . . | 109a |
| Exhibits Annexed to Affidavit of Fred Lowenschuss: | |
| Exhibit A - IRS Letter of Determination Dated February 28, 1972 | 124a |
| Exhibit B - Letter to Hon. Kevin Thomas Duffy Dated March 19, 1973 | 126a |
| Exhibit C - Letter to Hon. Kevin Thomas Duffy Dated April 23, 1973 | 127a |
| Exhibit D - Letter to Hon. Kevin Thomas Duffy Dated May 3, 1973 | 130a |
| Exhibit E - Letter of John A. Guzzetta Dated May 7, 1973 | 131a |
| Exhibit F - Letter of Fred Lowenschuss Dated May 10, 1973 | 132a |
| Endorsement Opinion of District Court Filed August 23, 1973 | 133a |
| Letter from the Disciplinary Board of the Supreme Court of Pennsylvania Dated November 20, 1973 | 135a |
| Plaintiff's Notice of Appeal Dated Aug- ust 27, 1973 | 136a |

Contents

| | Page |
|---|------|
| Order to Show Cause For a Stay Dated August 28, 1973 | 137a |
| Affidavit of John A. Guzzetta in Opposition to Motion For a Stay Dated September 4, 1973 | 139a |
| Transcript of Proceedings of September 5, 1973 | 142a |
| Order of District Court Filed Septem- ber 26, 1973 | 155a |
| Plaintiff's Notice of Appeal Dated Octo- ber 5, 1973 | 159a |
| Order of District Court Filed November 12, 1973 | 161a |
| Order to Show Cause to Vacate Order and Supporting Affidavit of Charles Sovel Dated November 28, 1973 | 167a |
| Affidavit of John A. Guzzetta in Opposition to Motion to Vacate Order Dated Novem- ber 30, 1973 | 172a |
| Memorandum Endorsement of District Court Filed December 4, 1973 | 176a |
| Memorandum and Order of District Court Filed April 16, 1974 | 177a |

Contents

| | Page |
|---|------|
| Notice of Appeal Dated October 25, 1973 . . | 180a |
| Order of United States Court of Appeals for the Second Circuit Dated January 8, 1974 | 182a |
| Plaintiff's Notice of Motion for Consolida- tion of Actions Dated August 8, 1973 . . . | 183a |
| Affidavit of Charles Sovel in Support of Foregoing Motion Dated August 8, 1973 . . | 185a |
| Affidavit of L. Francis Huck in Opposition to Foregoing Motion | 188a |
| Affidavit of Denis Mc Inernery in Opposi- tion to Motion to Consolidate Dated August 27, 1973 | 191a |
| Plaintiff's Notice of Motion to Remand, Vacate Decision and for Other Relief Dated April 5, 1974 | 194a |
| Affidavit of Fred Lowenschuss in Support of Foregoing Motion Dated April 5, 1974 . . | 196a |
| Exhibit A - Letter From Samuel Gutwein Dated October 17, 1973 - Annexed to Foregoing Affidavit of Fred Lowen- schuss | 206a |

Contents

| | Page |
|--|------|
| Affidavit of John A. Guzzetta in Opposition to Plaintiff's Motion to Remand, Vacate Decision and for Other Relief Dated April 18, 1974 | 207a |
| Memorandum Endorsement of District Court Filed May 3, 1974 | 212a |
| Memorandum Endorsement of District Court Filed May 3, 1974 | 213a |
| Order of District Court Filed May 9, 1974 . . | 214a |
| Exhibit A - Form of Notice to Shareholders - Attached to Foregoing Order . | 217a |
| Notice of Appeal of Plaintiff Fred Lowenschuss, Trustee for Fred Lowenschuss Associates Pension Plan Filed August 19, 1974 | 220a |
| Notice of Appeal of Rachel C. Carpenter Dated September 3, 1974 | 222a |
| Tender Offer to Purchase Common Stock of Texasgulf, Inc. | 224a |

CIVIL DOCKET
ED STATES DISTRICT COURT

73 CV. 2021

Jury demand date:

CLASS ACTION

DOCKET ENTRIES - SOUTHERN DISTRICT OF NEW YORK

No. 106 Rev.

1a

TITLE OF CASE

JUDGE DUFF

FRED LOWENSCHUSS, Trustee for
Fred Lowenschuss Associates Pension
Plan, Individually and on Behalf of
All Other Persons and Shareholders of
The Great Atlantic & Pacific Tea
Company, Inc. Who are Similarly
Situated,

Plaintiffs,

DISMISSED v. 7/16/73

W. J. KANE, H. J. BERRY, R. M. BROWN,
JR., W. CORBUS, D. K. DAVID, H. C.
GILLESPIE, J. S. KROH, E. A. LEPAGE,
R. F. LONGACRE, M. D. POTTS, J. M.
SCHIFF, P. A. SMITH, H. TAYLOR, JR.,
E. J. TONER, W. I. WALSH, N. F.
WHITTAKER, J. A. ZEIGLER (All of whom
are Officers and Directors of The
Great Atlantic & Pacific Tea Company,
Inc.) THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC., C. G. BLUHDORN,
GULF & WESTERN INDUSTRIES, INC. and
KIDDER, PEABODY & CO. INCORPORATED,

Defendants

RE-OPENED - 1-24-74

For plaintiff:

Abraham E. Freedman
36 Seventh Avenue
New York, N.Y. 10011
929-8410

346 West 17th

For defendant:

Sullivan & Cromwell (Kidder, Peabody &
48 Wall Street, N.Y. 10005 (HA 2-8100

TRANSFERRED FROM EASTERN DISTRICT OF PHILADELPHIA,
A. THEIR DOCKET # 73-339 FEES PAID

MILTON PAULSON
122 East 42nd St-NYC 10017 (697-0133)
(for claimant Rachel C. Carpenter)

| STATISTICAL RECORD | COSTS | DATE | NAME OR RECEIPT NO. | REC. | DISB. |
|--------------------------------------|--------------|---------|---------------------|------|-------|
| 5 mailed X | Clerk | 8/24/73 | Transf. | 5 | |
| | | 8/31/73 | Frederick | 5 | 5 |
| 6 mailed | Marshal | 10/1/73 | Ther | 5 | 5 |
| | | 10/5/73 | Freedman | 5 | 5 |
| | | | Frederick | | |
| of Action: SECURITIES & EXCHANGE fee | | | | | |
| ACT, 1933-1934 | | | | | |
| 00,000.00 | Witness fees | | | | |
| on arose at: | Depositions | | | | |

CLASS ACTION

73 CIV. 202

2a

JUDGE DUFF

Date
Judgment

PROCEEDINGS

- 73 Filed papers originally filed in U.S.D.C., Eastern District of Philadelphia, Pa., 73-339 were this date filed. Complaint, docket sheet, etc.
Record of Proceedings, U.S.D.C.S.D.N.Y.
- 73 Filed notice of motion of deft. C.G. Bluhdorn and Gulf & Western Ind., Inc. to dismiss complaint ret. on: July 1, 1973.
- 73 Filed memorandum in support of motion by defts. Charles G. Bluhdorn and Gulf and Western Industries, Inc for dismissal of the complaint.
- 73 Filed deft's. Great Atlantic and Pacific Tea Co., Inc. notice of motion for an order to dismiss the complaint ret. on: July 3, 1973.
- 73 Filed deft's. Great Atlantic and Pacific Tea Co., Inc. memorandum in support of motions to dismiss.
- 22-73 Filed deft's Kidder, Peabody & Co. notice of motion to dismiss the, complaint ret. 7-3-73.
- 22-73 Filed deft's memorandum in support of motion to dismiss complaint.
- 29-73 Filed plttf's affidavit & notice of cross-motion for summary judgment, ret. 7-3-73.
- 29-73 Filed plttf's memorandum of law in opposition to motion by deft. to dismiss complaint.
- 29-73 Filed plttf's memorandum of law in support of motion for summary judgment.
- 2-73 Filed deft's reply memorandum.
- 2-73 Filed plttf's attys notice of appearance.
- 6-73 Filed stip and order, that this action may be discontinued against defts. W.J. Kane; H.J. Berry; R.M. Brown; Jr. W. Corbus; D.K. David; H.C. Gillespie; J.S. Kroh; E.A. Le Page; R.F. Longacre; M.D. Potts; J.M. Schiff; P.A. Smith; H. Taylor, Jr.; E.J. Toner; W.I. Walsh; N.F. Whittaker; J.A. Ziegler; all of whom are officers & directors of Great Atlantic & Pacific Tea Co. & Great Atlantic & Pacific Tea Co, without prejudice and without costs, So Ordered Duffy J.
- 73 Filed Memorandum in support of motion by Defts C. G. Bluhdorn and G & W Industries Inc., for dismissal of the complaint.
- 73 Filed Deft Kidder, Peabody & Co. Incorp. response to interrogs of plttf.
- 27 73 Filed Interrogs of plttf addressed to Great Atl. & Pacific Tea Co., Inc. and all of its officers and directors. (Previously filed 3-15-73 USDC East. Dist. of Pa.)
- 5-73 Filed OPINION # 39707 by Duffy J. Plttfs motion for summary judgment is denied, defts motion for summary judgment is granted, but for reasons much more limited than those stated by the defts. While a tender offer is in effect (even an extended one as here) the person or persons making the offer do have obligations. They have a duty of dealing fairly with the persons making the tender. There is no evidence that the defts. have done anything other than deal fairly with plttf. and the class he represents. However since plttf. and the class he represents have suffered no damage cognizable at law, the complaint is dismissed. Settle Order on Notice. The plttf is to bear the costs of this action and also the costs of notifying the members of the class he represents, Duffy J. m/n
- 73 Filed deft. Great Atlantic & Pacific Tea Co, Inc's memo in support of motions to dismiss.
- 73 Filed deft. Great Atlantic & Pacific Tea Co. Inc's memo.
- 73 Filed plttf's memo of law in support of its motion for summary Judgment
- 73 Filed Plttf's memo of law in opposition to the motion of deft. Kidder, Peabody & Co. to dismiss the complaint.
- 5-73 Filed deft. Kidder, Peabody & Co! reply memo in support of its motion to dismiss.

SEE NEXT PAGE

CIVIL DOCKET

FILINGS - PROCEEDINGS

JUDGE DUFFY

AMOUNT
REPORTED IN
EMOLUMENT
RETURNS

| DATE | FILINGS - PROCEEDINGS | AMOUNT REPORTED IN EMOLUMENT RETURNS |
|----------|--|---|
| 3-73 | Filed Pltffs notice of motion. Re: Reargue, ret before Duffy J. on 8/14/73 | |
| 3-73 | Filed Pltffs memo of law in support of motion. | |
| 10-73 | Filed plttf's afdvt. & notice of motion for consolidation..Ret. 8/21/73 | |
| 14-73 | Filed memorandum of deft Kidder, Peabody & Co. In opposition | |
| 21-73 | Filed plttf's reply memo of law in support of motion for re-argument. | |
| 23-73 | Filed memo endorsed on motion papers dtd. 8/3/73. motion for re-argument is denied, So Ordered Duffy J. m/n | |
| 28-73 | Filed deft. Charles Bluhdorn and Gulf & Western Industries, Inc's affidavit by L. Fran Huck in opposition to motion to consolidate | |
| 28-73 | Filed deft. Charles Bluhdorn & Gulf & Western Industries Inc's memo in opposition | |
| 29-73 | Filed plttf's Notice of Appeal from decision dated July 25, 1973. xxx (Mailed copies) | |
| 29-73 | Filed deft. Great Atlantic & Pacific Tea Co's affidavit by Denis McInerney in opposi to motion to consolidate. | |
| 29-73 | Filed plttfs order to show cause, Re; Stay, ret before Duffy J. on 9/5/73 | |
| 26-73 | Filed reply memorandum of defts CG. Bluhdorn and Gulf Western Industries, Inc. | |
| 26-73 | Filed plttfs memorandum of law in opposition to the motion of deft Kidder, Peabody & Co. Inc. to dismiss the complaint. | |
| 26-73 | Filed plttfs memorandum of law in support of plttfs. motion for summary judgment etc. and in opposition to the motion of defts Bouhdorn and Gulf & Western Industries, Inc. for the dismissal of the complaint. | |
| 26-73 | Filed defts. Bludhorn and Gulf & Western Industries affdvt. by John A. Guzzetta in opposition to plttf's stay of order. | |
| 26-73 | Filed order that Summary Judgment be, granted in favor of defendants C.G. Bluhdorn, G&W, and Kidder, Peabody & Co., Inc., and against all plaintiffs, with prejudice; that said-defendants have judgment against all plaintiffs dismissing all counts of the complaint against said defts'., with costs; plaintiff Fred Lowenschuss notify the members of the c class of tendering A&P shareholders of this Order. Duffy, J. Judgment Entered Clerk. Mailed Notice 10-2-73 | |
| Oct 5-73 | Filed plttfs. notice of appeal from judgment entered 9-26-73. Mailed copies to: Simpson, Thacher & Bartlett Sullivan & Cromwell Cahill, Gordon & Heindel O'Line, Connelly & Chase, O'Donnell & Weyher | |
| 6-20-73 | Filed Entry of Appearance of Abraham E. Freedman atty for Plttfs | |

(CONT'D ON OTHER SIDE ---PAGE # 3)

| DATE | FILINGS—PROCEEDINGS | AMOUNT REPORTED IF EMOLUMENT RETURNS |
|----------------------------|--|---|
| 11-73 | Filed certification of record on appeal on 10-11-73. | |
| 12-73 | Filed order that the Great Atlantic & Pacific Tea Co., Inc. ("A&P") shareholders who tendered shares in accordance with G&W's invitation for tenders dated 2-1-73 are designated as a class pursuant to Rule 23 of FRCP and that Fred Lowenschuss is declared to be the representative of this class and that he notify the members of the class of this Order by 12-21-73 as indicated; that this Order shall, upon expiration of 15 days following the date for receipt of briefs, etc. as indicated constitute a final order and judgment that a summary judgment is granted in favor of defts. C.G. Bluhdorn, G&W and Kidder, Peabody & Co., Inc. ("Kidder, Peabody") and against all plttfs. herein with prejudice and that defts. C.G. Bluhdorn, G&W and Kidder, Peabody have judgment against all plttfs. dismissing all counts of the complaint against said defts. with costs and that the motion of plttf. for summary judgment is denied. DUFFY, J. mailed notices. | |
| 30-73 | Filed defts' Gulf & Western Industries, Inc. ("G & W") and Charles G. Bluhdorn's affdvt. in opposition to plttf's motion to strike Court's order of 11-12-73 | |
| 4-73 | Filed memo endorsed on unsigned order to show cause. The order to show cause proposed herein is to be considered as a motion and as such argument was heard from all parties. The unsigned proposed order may be filed. So ordered- DUFFY, J. (m/n) | |
| 4-73 | Filed transcript of record of proceedings, dated Sept. 5, 1973 | |
| 24-74 | Filed True Copy of USCA-motion to dismiss appeals and motion to affirm order of the USDC dismissing as moot the Lowenschuss' motion to intervene is granted; Lowenschuss' appeal granting summary judgment is remanded to the USDC for whatever action Duffy, J. will take--mailed notice. | |
| 10-74 | Filed plttfs Affidavit & Notice of Motion for an order remanding the within action to the U.S.D.C. for the EASTERN DISTRICT OF PENNSYLVANIA etc. as indicated. | |
| 10-74 | Filed plttfs brief in support of motion to remand and to vacate prior decisions. | |
| 16-74 | Filed Memorandum and Order-- since I find that the purported appeal from the 9-26-73 order was "manifestly ineffective", I was never divested of jurisdiction and the order of 11-12-73 was validly entered. Plttf's motion to vacate the Nov. 12 order is therefore denied in all respects. So ordered- DUFFY, J. (m/n) | |
| C CONT'D ON NEXT PAGE # 4) | | |

CIVIL DOCKET

CN

ED STATES DISTRICT COURT

Jury demand date:

No. 106A Rev.

DOCKET ENTRIES - EASTERN DISTRICT OF PENNSYLVANIA, U.A. 73-339

6a

| TITLE OF CASE | ATTORNEYS |
|---|--|
| FRED LOWENSCHUSS, TRUSTEE FOR FRED LOWENSCHUSS ASSOCIATES PENSION PLAN, INDIVIDUALLY AND BEHALF OF ALL OTHER PERSONS AND SHAREHOLDERS OF GREAT ATLANTIC & PACIFIC TEA CO., INC. WHO ARE SIMILARLY SITUATED, PLAINTIFFS | For plaintiff: FRED LOWENSCHUSS ASSOCIATES. 2 Penn Center Plaza (02) |
| VS. | |
| W. J. KANE, H. J. BERRY, R. M. BROWN, JR., W. CORBUS, D. K. DAVID, H. C. GILLESPIE, J. S. KROH, E. A. LEPAGE, R. F. LONGACRE, M. D. POTTS, J. M. SCHIFF, P. A. SMITH, H. TAYLOR, JR., E. J. TONER, W. J. WALSH, N. F. WHITTAKER, J. A. ZEIGLER (ALL OF WHOM ARE OFFICERS AND DIRECTORS OF GREAT ATLANTIC & PACIFIC TEA CO., INC.) AND GREAT ATLANTIC & PACIFIC TEA CO., INC. AND C. G. BLUHDORN AND GULF & WESTERN INDUSTRIES, INC. AND KIDDER, PEABODY & CO. | For defendant: Henry T. Reath, Esq. Duane, Morris & Heckscher 16th Fl., 100 S. Broad, 19110 FOR: Kane, Berry, Brown, Jr., Corbus, David, Gillespie, Kroh, LePage, Longacre, Potts, Schiff, Smith, Taylor, Jr., Toner, Walsh, Whittaker, Zeigler & Great Atlantic & Pacific Tea Co. |
| DEFENDANTS | |

| HISTORICAL RECORD | COSTS | DATE | NAME OR RECEIPT NO. | REC. | DISB. |
|------------------------|--------------|-------------|------------------------|------|-------|
| mailed | Clerk | 2/15/73 | 75305 | 15 | |
| mailed | Marshal | FEB 16 1973 | TO U.S. TREAS. | | |
| Action: Securities Act | Docket fee | | | | |
| | Witness fees | | | | |
| arose at: | Depositions | | | | |

JS-6
3/73

CN

7a

C.A. 73-339

FPI No. 1 1 22 100M 7

| DATE | PROCEEDINGS | Date of Judgment |
|---------|---|------------------|
| 1973 | | |
| Feb. 15 | Complaint filed. | |
| " 15 | Summons exit. | |
| " 26 | Summons returned "on 2-19-73 served Gulf & Western Industries, Inc., Charles G. Bluhdorn and Kidder, Peabody & Co.; and on 2-21-73 served remaining defts." and filed. | |
| " 26 | Plff's request for production of documents by Great Atlantic & Pacific Tea Co., et al, filed. | |
| Mar. 6 | Appearance of Henry T. Reath, Esq., Duane, Morris & Heckscher, for defts. W.J.Kane, H.J.Berry, R.M.Brown, Jr., W.Corbis, D.K.David, H.C.Gillespie, J.S.Kroh, E.A.LePage, R.F.Longacre, M.D.Potts, J.M.Schiff, P.A.Smith, H.Taylor, Jr., E.J.Toner, W.I.Walsh, N.F.Whittaker, J.A.Zeigler and Great Atlantic & Pacific Tea Co., Inc., filed. | |
| " 9 | Order dtd 3/7/73 extending time until 3/16/73 for defts W. J. Kane, et al to answer or otherwise move with respect to the complaint, filed. 3/9/73 entered & copies mailed. | CN |
| " 12 | Stipulation and Order extending time for defts. to answer to 4/11/73 filed | |
| " 15 | Plffs' interrogatories to deft Great Atlantic & Pacific Tea Co., Inc. and all of its officers and directors, filed | Clerk |
| " 15 | Deft's preliminary response to motion for class determination, filed. | |
| " 15 | Notice of/Western Industries to take deposition of Fred Lowenschuss, filed. | |
| " 15 | Memorandum for deft Gulf and Western Industries, Inc, filed. | |
| " 16 | Motion of Plff for class determination, memorandum and notice in support thereof, filed. | |
| " 16 | Motion of W. J. Kane, et al to dismiss action, or, in the alternative, to quash service of summons and affidavits, filed. | |
| " 16 | Motion of The Great Atlantic & Pacific Tea Co., Inc. to dismiss for failure to state a claim on which relief can be granted or, in the alternative, for judgment on the pleadings, filed. | |
| " 16 | Motion of The Great Atlantic & Pacific Tea Co., Inc. to transfer and affidavit, filed. | |
| " 16 | Answer of The Great Atlantic & Pacific Tea Co., Inc., filed. | |
| " 23 | Plffs' motion for disqualification of counsel for deft., A&P and its officers & directors, memorandum in support of motion & notice of motion, filed. | |
| " 23 | Defts' memorandum in opposition to motion for disqualification of counsel, filed. | |
| " 26 | Notice and Motion of C.G. Bluhdorn to Dismiss or to quash, Affidavit and Memorandum in support thereof, filed | |
| " 30 | Memorandum and Order, Newcomer, J. that this action is TRANSFERRED to the Southern District of New York, and all further proceedings are stayed until further order of Transferee Court, filed. (4-2-73 entered and notice mailed) | CN |
| Apr. 2 | Plff transfer order pursuant to 28 USC Section 1404(A) | |
| " 2 | Plff motion & notice of motion for a protective order under fed. rules & memorandum in support thereof, filed. | |
| May 4 | Original record and cert. copy of, docket entries transferred to U.S.D.C. for the S. District of New York. | |

COMPLAINT (Filed May 7, 1973)
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

8a

FRED LOWENSCHUSS, TRUSTEE FOR
FRED LOWENSCHUSS ASSOCIATES
PENSION PLAN, INDIVIDUALLY AND
ON BEHALF OF ALL OTHER PERSONS
AND SHAREHOLDERS OF GREAT
ATLANTIC & PACIFIC TEA CO., INC.
WHO ARE SIMILARLY SITUATED,

PLAINTIFFS

VS.

W. J. KANE, H. J. BERRY,
R. M. BROWN, JR., W. CORBUS,
D. K. DAVID, H. C. GILLESPIE,
J. S. KROH, E. A. LEPAGE,
R. T. LONGACRE, M. D. POTTS,
J. M. SCHIFF, P. A. SMITH,
H. TAYLOR, JR., E. J. TONER,
W. A. WALSH, N. F. WHITTAKER,
J. A. ZEIGLER (ALL OF WHOM ARE
OFFICERS AND DIRECTORS OF
GREAT ATLANTIC & PACIFIC TEA
CO., INC.) AND
GREAT ATLANTIC & PACIFIC TEA
CO., INC. AND
C. G. BLUHDORN AND
GULF & WESTERN INDUSTRIES, INC.
AND KIDDER, PEABODY & CO.

DEFENDANTS

COMPLAINT

AND NOW, COMES THE PLAINTIFF, FRED LOWENSCHUSS ASSOCIATES
PENSION PLAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS
SIMILARLY SITUATED, BY AND THROUGH THEIR TRUSTEE AND COUNSEL,
FRED LOWENSCHUSS ASSOCIATES, AND FOR THEIR CLAIMS AGAINST THE
DEFENDANTS, ALLEGE AND STATE, UPON KNOWLEDGE, INFORMATION AND
BELIEF THE FOLLOWING:

1. THE NAMED PLAINTIFF IS THE TRUSTEE OF A PENSION PLAN,
WHICH PENSION FUND, AT ALL TIMES RELEVANT HERETO, OWNED TWO
THOUSAND SHARES OF COMMON STOCK OF GREAT ATLANTIC & PACIFIC TEA
CO., INC., WHICH IT PROPERLY TENDERED ON TUESDAY, FEBRUARY 13,
1973, THROUGH ITS AUTHORIZED STOCK BROKER, HERZFELD AND STERN,
TO GULF & WESTERN INDUSTRIES, INC., THROUGH ITS DESIGNATED
DEPOSITORY, THE MANUFACTURERS HANOVER TRUST COMPANY.

CIVIL ACTION NO. 73-339

CLASS ACTION

SECURITIES ACT OF 1933
SECURITIES EXCHANGE ACT 1934

CONSPIRACY

MISREPRESENTATION, FRAUD
AND DECEIT

COMPENSATORY, EXEMPLARY
AND PUNITIVE DAMAGES

JUDGE DUFFY

FILED

FEB 15 1973

By: [Signature] CLERK

2. THIS ACTION IS BROUGHT ON BEHALF OF THE NAMED PLAINTIFF AS THE TRUSTEE, . AND ON BEHALF OF ALL OTHER PERSONS AND/OR ENTITIES SIMILARLY SITUATED.

3. DEFENDANT, KIDDER PEABODY & Co., IS THE INVESTMENT BANKER AND AGENT OF DEFENDANT, GULF & WESTERN, INC. AT ALL TIMES RELEVANT HERETO.

4. THE DEFENDANT, GULF & WESTERN INDUSTRIES, INC., IS A PUBLIC CORPORATION TRADED ON THE NEW YORK STOCK EXCHANGE WITH MANY DIVERSIFIED HOLDINGS, WHICH DEFENDANT CORPORATION IS COMMONLY REFERRED TO AS A CONGLOMERATE.

5. DEFENDANT, CHARLES BLUMDORN, IS THE CHAIRMAN OF THE BOARD AND CHIEF OPERATING OFFICER OF GULF & WESTERN INDUSTRIES, INC., WHO IS ALSO A SHAREHOLDER HIMSELF IN MANY DIFFERENT PUBLIC CORPORATIONS.

6. GREAT ATLANTIC & PACIFIC TEA Co., INC., IS A PUBLIC CORPORATION, WHOSE STOCK IS TRADED ON THE NEW YORK STOCK EXCHANGE, AND WHICH COMPANY HAD APPROXIMATELY 24,875,224 SHARES OF COMMON STOCK OUTSTANDING AT THE TIME IN QUESTION, OF WHICH APPROXIMATELY 7.9 MILLION SHARES OF COMMON STOCK WERE IN THE HANDS OF THE GENERAL PUBLIC.

7. ALL OTHER NAMED DEFENDANTS HEREIN ARE OFFICERS AND DIRECTORS OF GREAT ATLANTIC & PACIFIC TEA Co., INC. AND SAID PERSONS ARE BEING SUED IN THEIR OWN RIGHT AS WELL AS IN THEIR CAPACITY AS OFFICERS, DIRECTORS AND AGENTS OF DEFENDANT, GREAT ATLANTIC & PACIFIC TEA Co., INC.

JURISDICTION

8. THIS COURT'S JURISDICTION OF THIS ACTION IS BASED ON THE SECURITIES ACT OF 1933, THE SECURITIES EXCHANGE ACT OF 1934, THE RULES AND REGULATIONS PROMULGATED THEREUNDER BY THE SECURITIES EXCHANGE COMMISSION.

CLASS ACTION ALLEGATIONS

10a

9. THIS CLASS ACTION IS BROUGHT PURSUANT TO AND UNDER RULES 23(A) AND SPECIFICALLY 23(B)(1) AND/OR (B)(3) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

10. THIS ACTION IS BROUGHT ON BEHALF OF THE NAMED PLAINTIFFS AND ALL OTHER PERSONS OR ENTITIES WHO TENDERED COMMON SHARES OF STOCK OF THE GREAT ATLANTIC & PACIFIC TEA CO., INC., TOTALING 3,750,000 SHARES IN ACCORDANCE WITH THE TENDER OFFER MADE ON FRIDAY, FEBRUARY 2, 1973 BY DEFENDANT, GULF & WESTERN INDUSTRIES, INC.

11. THE CLASS REPRESENTED BY THE PLAINTIFF IS SO NUMEROUS AS TO MAKE IT IMPRACTICAL TO BRING ALL OF THE CLASS MEMBERS BEFORE THE COURT.

12. THE INDIVIDUAL AMOUNTS OF EACH OF THE LITIGANTS ARE RELATIVELY SMALL IN RELATION TO THE EXTENSIVE LITIGATION NECESSARY TO OBTAIN SATISFACTION AND REDRESS AGAINST DEFENDANTS HEREIN. HOWEVER, WHEN THE DAMAGES SUSTAINED BY THE PLAINTIFFS' CLASS ARE VIEWED IN THE AGGREGATE, THE DAMAGES ARE FANTASTICALLY LARGE AND BELIEVED TO BE IN THE MILLIONS OF DOLLARS, JUSTIFYING THE EXPENSE AND EFFORT IN THIS LEGAL ACTION.

13. COMMON QUESTIONS OF LAW AND FACT AFFECT THE RIGHTS OF EVERY CLASS MEMBER AND A COMMON RELIEF, DAMAGES, IS SOUGHT BY THE CLASS PLAINTIFFS.

14. COMMON QUESTIONS OF LAW AND FACT PREDOMINATE:

(A) THE RIGHT OF ALL SHAREHOLDERS WHO PROPERLY TENDERED THEIR SHARES OF STOCK IN GREAT ATLANTIC & PACIFIC TEA CO., INC. TO RECEIVE \$20.00 PER SHARE FOR THEIR TENDERED SHARES WITHIN FIVE DAYS OF FEBRUARY 13, 1973;

(B) THE IMPROPER ACTIONS OF DEFENDANT, GREAT ATLANTIC & PACIFIC TEA CO., INC., AND ITS OFFICERS AND DIRECTORS IN BRINGING ACTIONS TO ENJOIN CONSUMATION OF THE TENDER OFFER;

(C) THE BREACH OF FIDUCIARY RELATIONSHIP OF THE OFFICERS AND DIRECTORS OF THE GREAT ATLANTIC & PACIFIC TEA CO., INC. TO ITS PUBLIC SHAREHOLDERS;

(D) THE QUESTION OF IMPROPERLY PREPARING OF THE TENDER OFFER BY DEFENDANTS, GULF & WESTERN INDUSTRIES, INC., AND/OR ITS CHAIRMAN, CHARLES BLUHDORN AND/OR KIDDER, PEABODY & CO.

(E) WHETHER DEFENDANTS INDIVIDUALLY AND/OR IN DIFFERENT COMBINATIONS ENGAGED IN ANY ACT, PRACTICE OR COURSE OF BUSINESS WHICH OPERATED OR WOULD TEND TO OPERATE AS A FRAUD OR DECEIT UPON PLAINTIFFS IN CONNECTION WITH THE TENDER OFFER AND THE ENJOINING OF OR THE CONSUMATION OF SAID OFFER;

(F) WHETHER DEFENDANTS, ANY ONE OR MORE OF THEM, ARE LIABLE FOR EXEMPLARY OR PUNITIVE DAMAGES BY REASON OF THE WILFUL, WANTON OR INTENTIONAL NATURE OF THEIR HARMFUL ACTS.

15. SEPARATE ACTIONS BY MEMBERS OF PLAINTIFFS' CLASS WOULD CREATE A RISK OF ADJUDICATION OF SOME CLASS MEMBER'S RIGHTS, WHICH, AS A PRACTICAL MATTER, WOULD BE DESPOSITIVE OF OTHER MEMBERS' INTERESTS WHO ARE NOT PARTIES, OR WOULD IMPAIR OR IMPEDE THEIR ABILITY TO PROTECT THEIR INTEREST.

16. SEPARATE ACTIONS BY MEMBERS OF PLAINTIFFS' CLASS AGAINST DEFENDANTS WOULD CREATE A RISK OF INCONSISTENT ADJUDICATION AS BETWEEN THE PARTIES, THEREBY CREATING INCONSISTENT STANDARDS OF CONDUCT FOR THE DEFENDANTS.

17. THE NAMED PLAINTIFFS WILL ASSURE THE ADEQUATE REPRESENTATION OF ALL MEMBERS OF THE CLASS, AND THEY CAN AND DO UNDERTAKE HONORABLY TO REPRESENT THE CLASS. SAID PLAINTIFFS HAVE NO INTEREST WHICH ARE ADVERSE TO THE CLASS AND COUNSEL, FRED LOWENSCHUSS ASSOCIATES, WHO ARE CAPABLE AND COMPETENT ATTORNEYS, WITH EXTENSIVE TRIAL EXPERIENCE, AND WITH CLASS ACTION EXPERIENCE, WILL PROPERLY AND ADEQUATELY REPRESENT ALL THE MEMBERS OF THE CLASS.

18. THE MAINTENANCE OF THIS SUIT AS A CLASS ACTION WOULD AID IN PREVENTING A MULTIPLICITY OF LITIGATION AGAINST THESE DEFENDANTS BY MEMBERS OF THE PLAINTIFFS' CLASS.

19. THIS IS THE ONLY KNOWN SUIT AGAINST THE DEFENDANTS HEREIN, STEMMING FROM THE CONDUCT COMPLAINED OF BY PLAINTIFF AND MEMBERS OF ITS CLASS.

20. AT THE TIME OF THE OCCURRENCES OF THE ACTS HEREINAFTER COMPLAINED OF, THE DEFENDANTS DID ACT ON THEIR OWN BEHALF AND THE CORPORATE DEFENDANTS HEREIN ACTED THROUGH THEIR AGENTS, SERVANTS, WORKMEN OR EMPLOYEES, ALL OF WHOM WERE AT ALL TIMES ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT AND IN FURTHERANCE OF THE ALLEGED INTEREST OF DEFENDANT CORPORATIONS AND IN FURTHERANCE OF THE ALLEGED BUSINESS OF SAID CORPORATE DEFENDANTS.

GENERAL ALLEGATIONS

21. ON FEBRUARY 2, 1973, DEFENDANT, GULF & WESTERN INDUSTRIES, INC., THROUGH ITS AUTHORIZED AGENTS, OFFICERS AND DIRECTORS, AND EMPLOYEES, AND THROUGH THE INVESTMENT BANKING HOUSE OF DEFENDANT, KIDDER, PEABODY & CO., MADE A PUBLIC OFFER AND COMMITMENT TO PURCHASE 3,750,000 SHARES OF COMMON STOCK OF THE GREAT ATLANTIC & PACIFIC TEA CO., INC., TO ANY AND ALL SHAREHOLDERS WHO TENDERED SAID SHARES OF STOCK ON OR BEFORE TUESDAY, FEBRUARY 13, 1973 AT 5:00 P.M., EASTERN STANDARD TIME, TO THE DEPOSITORY, MANUFACTURERS HANOVER TRUST COMPANY, AND DEFENDANT, GULF & WESTERN, AGREED TO PAY \$20.00 CASH, NET PER SHARE, FOR EACH SUCH SHARE PROPERLY TENDERED. PAYMENT TO BE MADE AS SOON AS PRACTICABLE, WHICH IS INTERPRETED AS BEING WITHIN FIVE DAYS IN ACCORDANCE WITH THE SALE AND PAYMENT FOR SECURITIES TRANSACTIONS.

22. THAT DEFENDANT, GULF & WESTERN, AND ITS CHIEF OPERATING OFFICER, CHARLES BLUHDORN, WARRANTED TO THE GENERAL PUBLIC THAT THE PURCHASE OF THE 3,750,000 SHARES IN QUESTION WAS FOR INVESTMENT PURPOSES AND THAT SAID DEFENDANTS HAD COMPLIED WITH ALL LAWS, RULES AND REGULATIONS PERTAINING TO SAID TENDER OFFER AND THAT THERE WERE NO LEGAL IMPEDIMENTS TO THE PURCHASE OF SAID SHARES FROM THE GENERAL PUBLIC.

23. DEFENDANT, KIDDER, PEABODY & CO., AS INVESTMENT BANKER AND SPECIALIST IN THE FIELD OF SECURITIES, AIDED AND ABETTED DEFENDANT, GULF & WESTERN, IN THE MAKING OF SAID OFFER TO THE GENERAL PUBLIC AND SAID INVESTMENT FIRM ALSO WARRANTED TO THE GENERAL PUBLIC THAT THE ACTIONS TAKEN BY THEIR CLIENT IN THE TENDER OFFER WERE LEGAL AND PROPER.

24. THE ACTIONS OF DEFENDANT, GULF & WESTERN, CHARLES BLUHDORN, AND KIDDER, PEABODY & CO., HAVE CAUSED WIDE PERCENTAGE FLUCTUATIONS IN THE QUOTED PRICE ON THE NEW YORK STOCK EXCHANGE OF THE COMMON STOCK OF THE GREAT ATLANTIC & PACIFIC TEA CO., INC., CAUSING THE GENERAL PUBLIC TO RE-EVALUATE THE VALUE OF THE COMMON STOCK OF A & P DUE TO THE OFFER OF PURCHASE AT \$20.00 PER SHARE, WHICH CAUSED SAID STOCK TO RISE IN VALUE FROM A LOW OF 14-3/8 TO A HIGH OF 18-7/8, WHEREBY CERTAIN INVESTORS RECEIVED MORE MONEY FOR THE SALE OF THEIR SHARES AND CERTAIN PURCHASERS PAID MORE MONEY FOR THEIR SHARES DUE TO THE ARTIFICIAL PEGGING OF THE PRICE OF THE COMMON STOCK CAUSED BY THE TENDER OFFER.

25. AT ALL TIMES RELEVANT HERETO, THE GREAT ATLANTIC & PACIFIC TEA CO., INC., AND ITS OFFICERS AND DIRECTORS WHO ARE THE NAMED DEFENDANTS HEREIN, OWED A FIDUCIARY DUTY TO ITS SHAREHOLDERS.

14a
26. THAT IN BREACH OF SAID FIDUCIARY DUTY, THE OFFICERS AND DIRECTORS OF A & P AND THE CORPORATION ITSELF INSTITUTED A LAW SUIT TO ENJOIN GULF & WESTERN, INC., AND/OR KIDDER, PEABODY & CO., FROM PROCEEDING WITH THE TENDER OFFER TO PURCHASE AND PAY FOR THE 3,750,000 SHARES WHICH WERE PROPERLY TENDERED PURSUANT TO SAID OFFER BY PLAINTIFFS AND THE MEMBERS OF THEIR CLASS.

27. THAT SAID ACTIONS BY THE OFFICERS AND DIRECTORS OF A & P AND THE A & P COMPANY WERE IN BREACH OF THEIR FIDUCIARY RELATIONSHIP TO THEIR SHAREHOLDERS, AND SAID ACTIONS BY SAID DEFENDANTS HEREIN WERE MOTIVATED BY PERSONAL GAIN AND AGGRANDIZEMENT, AND TAKEN FOR THE SOLE PURPOSE FOR PERPETUATING THEIR EMPLOYMENT STATUS.

28. THAT THE ACTIONS OF A & P AND ITS OFFICERS AND DIRECTORS WERE NOT IN THE BEST INTEREST OF ITS SHAREHOLDERS AND WERE, IN ACTUALITY, DETRIMENTAL BOTH TO THE A & P COMPANY AND ITS SHAREHOLDERS IN THAT LARGE SUMS OF MONEY WERE CAUSED TO BE EXPENDED BY DEFENDANT, A & P FOR PURPOSES OF OPPOSING A TENDER OFFER WHICH WAS BENEFICIAL TO THE SHAREHOLDERS OF A & P AND NOT DETRIMENTAL TO THE A & P CORPORATION.

29. THAT THE OFFICERS AND DIRECTORS OF A & P EXPENDED MANY HOURS OF THEIR TIME AND THE TIME OF OTHER EMPLOYEES ON THE PAYROLL OF DEFENDANT, A & P, FOR THE PURPOSES OF WRONGFULLY OPPOSING AND DESTROYING THE TENDER OFFER AND THE OPPORTUNITY OF THE PUBLIC SHAREHOLDERS TO RECEIVE \$20.00 PER SHARE IMMEDIATELY FOR THEIR SHARES OF STOCK, WHICH WERE, AT THE TIME OF THE TENDER OFFER, SELLING AT A SUBSTANTIAL SUM LESS THAN \$20.00 ON THE NEW YORK STOCK EXCHANGE.

30. THE ACTIONS OF THE OFFICERS AND DIRECTORS OF A & P ALLEGEDLY ON BEHALF OF A & P, TO PREVENT THE PLAINTIFF CLASS OF SHAREHOLDERS FROM RECEIVING PROMPT PAYMENT OF \$75,000,000.00 FROM DEFENDANT, GULF & WESTERN, WERE A WILFUL AND WANTON INTERFERENCE IN THE CONTRACTUAL RELATIONSHIP AND BUSINESS DEALINGS BETWEEN THE PLAINTIFFS' CLASS AND DEFENDANT, GULF & WESTERN.

31. THAT EACH DAY THAT PAYMENT FOR THE TENDERED SHARES IS DELAYED, THE PLAINTIFF CLASS LOSES \$12,500.00 IN INTEREST.

32. THAT IN THE EVENT THE TENDER OFFER IS NOT CONSUMATED, EXTENSIVE DAMAGES WILL BE SUFFERED BY PLAINTIFFS AND MEMBERS OF THE CLASS IN THAT THEIR STOCKHOLDINGS AND VALUE THEREOF WILL BE GREATLY REDUCED.

WHEREFORE, PLAINTIFFS, ON ITS OWN BEHALF, AND ON BEHALF OF ALL MEMBERS OF THEIR CLASS, DEMAND:

(A) THAT DEFENDANTS INDIVIDUALLY AND JOINTLY BE ORDERED TO PAY \$75,000,000.00 PLUS THE LEGAL RATE OF INTEREST FROM FEBRUARY 19, 1973 UNTIL THE DATE OF PAYMENT FOR ALL TENDERED SHARES;

(B) THAT DEFENDANTS INDIVIDUALLY AND/OR JOINTLY BE ORDERED TO PAY ANY AND ALL DAMAGES TO PLAINTIFF AND MEMBERS OF PLAINTIFFS' CLASS OCCASIONED BY THE ACTIONS OF SAID DEFENDANTS;

(C) IN THE EVENT A DETERMINATION IS MADE THAT DEFENDANT, GULF & WESTERN INDUSTRIES, INC., IS NOT PERMITTED TO ACCEPT THE SHARES AS TENDERED, THAT THE DEFENDANTS INDIVIDUALLY AND/OR JOINTLY BE ORDERED TO PAY ANY AND ALL DAMAGES AND LOSSES SUFFERED BY PLAINTIFF AND PLAINTIFFS' CLASS DUE TO THE ACTIONS OF SAID DEFENDANTS;

(D) THAT PUNITIVE AND EXEMPLARY DAMAGES BE ASSESSED AGAINST DEFENDANT, GREAT ATLANTIC & PACIFIC TEA CO., INC. AND ITS OFFICERS AND DIRECTORS FOR THEIR WILFUL AND WANTON INTERFERENCE WITH THE RIGHTS OF THE SHAREHOLDERS OF A & P TO RECEIVE PROMPT AND FULL PAYMENT FOR THE SHARES AS TENDERED;

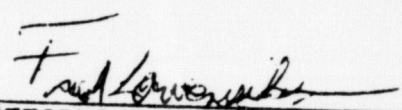
(E) THAT DEFENDANT OFFICERS AND DIRECTORS OF A & P BE ORDERED TO REIMBURSE GREAT ATLANTIC & PACIFIC TEA CO., INC. FOR ALL EXPENSES AND LOST TIME OCCASIONED BY THEIR INTERFERING WITH THE PLAINTIFF CLASS FROM RECEIVING PROMPT PAYMENT FOR THE TENDERED SHARES;

(F) THAT DEFENDANTS INDIVIDUALLY AND JOINTLY BE REQUIRED TO PAY THE COSTS OF THIS LITIGATION, INCLUDING REASONABLE ATTORNEYS FEES AND COSTS OF GIVING NOTICE TO ALL MEMBERS OF PLAINTIFFS' CLASS.

(G) SUCH OTHER RELIEF AS THE COURT MAY DEEM NECESSARY AND PROPER IN THE INTEREST OF JUSTICE.

FRED LOWENSCHUSS ASSOCIATES

BY:


ATTORNEYS FOR PLAINTIFF

Offer to Purchase 3,750,000 Shares of Common Stock of
The Great Atlantic & Pacific Tea Company, Inc.
for cash at \$20 Net Per Share

This Offer Expires on Tuesday, February 13, 1973 at 5:00 P.M. Eastern Standard Time,
unless otherwise extended as provided below.

To the Holders of Common Stock of

February 1, 1973

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.:

Gulf & Western Industries, Inc. ("G & W") hereby offers to purchase 3,750,000 shares of Common Stock, \$1 per value (the "Shares"), of The Great Atlantic & Pacific Tea Company, Inc. ("A & P") at \$20 per share (net to the seller) in cash, upon terms and conditions set forth in this Offer and in the related Letter of Tender.

1. **Number of Shares.** G & W will purchase all shares of A & P Common Stock which have been duly tendered by 5:00 P.M. Eastern Standard Time on Tuesday, February 13, 1973, up to the maximum of 3,750,000 Shares. If more than 3,750,000 Shares (approximately 15% of the outstanding Shares) are tendered by February 13, 1973, G & W will purchase 3,750,000 Shares on a pro rata basis and it reserves the right, but will not be obligated, to purchase any number of additional tendered Shares on a pro rata basis. (Any pro rata purchases will be appropriately adjusted to avoid the purchase of fractional shares.)

If G & W extends this Offer, any Shares tendered during any such extension which are purchased by G & W will be purchased on a first-come, first served basis.

2. **Payment of Purchase Price.** Payment for all Shares duly tendered and purchased pursuant to this Offer will be made by G & W as soon as practicable following the expiration of this Offer. If this Offer is extended, G & W will either agree to purchase Shares tendered by February 13, 1973 on that date and pay for such Shares as soon as practicable after February 13, 1973 or it will wait until any extended expiration date to purchase any tendered Shares. G & W may also purchase Shares tendered during any extension on a daily basis as they are tendered.

IMPORTANT

Any stock holder wishing to accept this Offer should either (a) complete and sign the Letter of Tender in the place required and forward it with his stock certificate to the Depository or (b) request his bank or broker to effect the transaction for him. Holders of A & P Common Stock having shares registered in the name of a broker, dealer or bank nominee should contact their broker, dealer or bank if they desire to tender their shares.

Tender Offer to Purchase Common Stock of A&P

Certificates for any tendered Shares not purchased by G & W will be returned without expense to the tendering stockholder as soon as practicable after expiration of this Offer. G & W will pay all transfer taxes payable on the transfer of tendered Shares to it, as well as all charges and expenses of the Depository.

On January 30, 1973 and January 31, 1973, the closing prices of A & P Common Stock on the New York Stock Exchange were \$15³/₈ and \$16⁷/₈, respectively. The following table shows the high and low sales prices of A & P Common Stock on the New York Stock Exchange for the periods indicated:

| 1971: | High | Low |
|--|----------------------------------|----------------------------------|
| First Quarter | \$33 ³ / ₄ | \$27 ¹ / ₄ |
| Second Quarter | 31 ³ / ₄ | 25 |
| Third Quarter | 27 ³ / ₄ | 23 ¹ / ₄ |
| Fourth Quarter | 23 ³ / ₄ | 18 |
| 1972: | | |
| First Quarter | 22 ³ / ₄ | 17 ¹ / ₄ |
| Second Quarter | 20 ³ / ₄ | 16 |
| Third Quarter | 18 | 15 ¹ / ₄ |
| Fourth Quarter | 18 ³ / ₄ | 15 ³ / ₄ |
| 1973: | | |
| First Quarter (through January 31) | 17 ³ / ₄ | 14 ³ / ₄ |

Tenders by A & P stockholders will be taxable transactions and stockholders are urged to consult their tax advisers to determine their tax consequences in the event they tender.

3. **Withdrawal of Tender.** A & P stockholders who tender their Shares pursuant to this Offer may withdraw the Shares so tendered at any time prior to the close of business on February 9, 1973. If this Offer is extended, stockholders may in any event withdraw tendered Shares at any time after April 3, 1973, if such Shares have not previously been purchased by G & W. Except as otherwise stated in this paragraph, tenders are irrevocable.

4. **Acceptance of Offer.** To be properly tendered pursuant to this Offer, certificates for Shares of A & P Common Stock, together with a properly executed Letter of Tender and any other required documents, should be transmitted to and received by the Depository at the address set forth below, at or prior to 5:00 P.M. Eastern Standard Time on February 13, 1973 (or, if this Offer is extended as hereinafter provided, at or prior to the time specified in such extension). Signatures on all Letters of Tender must be guaranteed by a commercial bank or trust company located in New York City or located in the United States and having a correspondent in New York City or by a member of the New York or American Stock Exchange. If certificates are registered in the name of a person other than the signer of the Letter of Tender, the certificates must be endorsed or accompanied by stock powers signed by the registered owner with the signature on the endorsement or stock power guaranteed by a commercial bank or trust company located in New York City or located in the United States and having a correspondent in New York City or by a member of the New York or American Stock Exchange.

Tenders may be made without the concurrent deposit of stock certificates if such tenders are made (a) through members of any national securities exchange or the National Association of Securities Dealers, Inc., or by commercial banks or trust companies in the United States. In such cases the Letter of Tender, which must be received prior to the expiration of this Offer, must contain a guarantee that if the tendered Shares are accepted, certificates will be deposited within five business days after the expiration of the Offer and would relate the serial numbers of the certificates representing such Shares. Payment for Shares so tendered and purchased will be made only against deposit of the certificates. In all other cases the Letter of Tender must be accompanied by the stock certificates.

Tender Offer to Purchase Common Stock of A&P

If a stockholder desires to accept this Offer and time will not permit his Letter of Tender to reach the Depository before the expiration of the Offer, his tender may be effected if his stock certificates, together with a properly executed Letter of Tender and any other required documents, have been deposited with a member of any national securities exchange or the National Association of Securities Dealers, Inc., or a commercial bank or trust company in the United States, and the Depository has received prior to the expiration of the Offer a telegram or letter from such member firm, bank or trust company setting forth the name of the stockholder, the number of Shares tendered and the serial numbers of the certificates representing such Shares, and stating that the tender is being made thereby and that within five business days the stock certificates, together with the Letter of Tender and any other required documents, will be forwarded by such member firm, bank or trust company to the Depository.

The delivery of the Letter of Tender and the acceptance of this Offer will constitute an agreement between the tendering stockholder and G & W, in accordance with the terms of this Offer, only when the duly signed Letter of Tender, or a telegram or letter (as provided above) from a member of a national securities exchange or the National Association of Securities Dealers, Inc., or a bank or trust company in the United States, is received by the Depository.

5. Information with Respect to G & W and Related Matters. G & W is a diversified company principally engaged in financing and financial services; writing insurance; the production and distribution of motion pictures and television film series and other leisure time activities; the production of food products, paper products and building products; the manufacture of cigars; the production of zinc products; the distribution of automotive replacement parts and the manufacture of heavy machinery, other capital goods and a number of other industrial products.

G & W is a Delaware corporation with its business address at 1 Gulf & Western Plaza, New York, New York 10013.

Funds required by G & W to purchase shares of A & P Common Stock tendered pursuant to this Offer are estimated to be approximately 128,000,000 (including expenses of approximately 1,000,000) Shares are purchased. G & W will obtain such funds from the sale of corporate funds and the liquidation of various of G & W's subsidiaries.

G & W is purchasing the Shares pursuant to this Offer as an investment. G & W has no intention to seek to purchase any additional shares of A & P Common Stock.

As of January 31, 1973 G & W owned 1,045,800 shares of A & P Common Stock, controlling approximately 4.25% of the outstanding shares of such stock. G & W acquired such shares in market transactions during the period from March 1, 1972 to January 18, 1973 at prices ranging from \$14 3/4 to \$16 1/4 per Share. G & W purchased 291,600 of such Shares during the period July 1, 1972, at prices ranging from \$16 1/4 to \$17 1/4 per Share.

The directors of G & W are as follows: Ely T. Abbott, Jr., Senior Vice President of G & W; Joseph D. Barnett, Vice Chairman of the Board of Directors of American Corporation of North America ("Associates"), a G & W subsidiary; Charles G. Chubb, Chairman of the Board of G & W; Martin S. Davis, Senior Vice President of G & W; Joel Dolkart, Senior Partner of Simpson, Thatcher & Parlett, attorneys, and General Counsel and Secretary of G & W; John H. Duncan, Chairman of G & W's Executive Committee; D. Lyle Fife, retired; Don E. Garton, Executive Vice President of G & W; David H. Judelson, President of G & W; Judd Leighton, Chairman of the Board of Bonicia Industries, Inc.; Francis S. Levien, Chairman of the Board and President of Universal American Corporation, a G & W subsidiary; T. H. Neyland, General Partner of Southwest Growth Pool, Ltd., of Houston, Texas, an investment partnership; Irwin Schloss, President of Marcus Schloss & Co., Inc.; William W. Sharrill, President of Associates; Samuel J. Siberman, President of G & W Foundation; George A. Smathers, Senior Partner of Smathers & Merrigan, attorneys, and Harold U. Zerbe, Chairman of the Board of The New Jersey Zinc Company, a G & W subsidiary. The other officers of G & W

Tender Offer to Purchase Common Stock of A&P

are: Guy H. Pitts, Senior Vice President—Manufacturing; Neil J. Coll, Vice President; Alvaro L. Corta, Vice President—Operations; Edward O. Falberg, Vice President—Operations; Norman R. Forson, Vice President and Treasurer; Milton B. Holander, Vice President—Technology; Robert L. Jones, Vice President and Resident Counsel; E. W. Kelley, Vice President—Operations; Matthew J. Lawler, Vice President—Employee Relations; Lawrence I. Levinson, Vice President; George A. Longtin, Vice President—Operations; Victor J. Nutt, Vice President; Gerald I. Rithaler, Vice President; Frank M. Rogers, Vice President—Operations; James J. Shaw, Vice President—Operations; Richard B. Stearns, Jr., Vice President; and William M. Hatley, Controller.

Charles G. Bluhdorn, Chairman of the Board and chief executive officer of G & W, owns 170,337 shares of common stock of The Bohack Corporation ("Bohack") (about 14% of the outstanding shares of such stock) and is a director of Bohack. Bohack owns and operates a chain of supermarkets in the New York metropolitan area. Mr. Bluhdorn has placed his shares of Bohack common stock in a voting trust and has tendered his resignation as a director of Bohack, effective as of February 1, 1973. Three other officers or directors of G & W—Messrs. Abbott, Dolkett and Leven—are also directors of Bohack and they have also tendered their resignations as directors of Bohack effective as of February 1, 1973.

6. **Dividends and Distributions.** If A & P should split its shares of Common Stock or combine or otherwise change its shares of Common Stock during the pendency of this Offer, appropriate adjustment in the purchase price and number of Shares offered to be purchased pursuant to this Offer (as well as the fees payable) will be made. If A & P should declare any dividend or distribution or issue any rights with respect to its Common Stock, which are payable to holders of record on a date occurring prior to the transfer to G & W's name on the stock transfer records of A & P of the Shares purchased pursuant to this Offer, then (i) the purchase price per share payable by G & W pursuant to this Offer will be reduced by the amount of any cash dividends, and (ii) the gross amount of any such distribution or rights will be required to be remitted by the tendering stockholders to the Depositary for the account of G & W; and pending such remittance or appropriate assurance thereof, G & W may withhold the purchase price or deduct from the purchase price the amount or value of such other distribution or rights as to any Shares purchased by G & W but not transferred to G & W's name prior to the record date therefor.

7. **Commissions.** G & W will pay to any broker or dealer who is a member of the National Association of Securities Dealers, Inc. or any foreign dealer who agrees to conform to the Rules of Fair Practice of such Association or any member of a national securities exchange or any commercial bank or trust company (collecting Dealers), a commission of 15¢ for each Share purchased pursuant to this Offer, provided the name of such firm appears in the appropriate space in the Letter of Tender. The Dealer Manager will receive for its services a commission of 15¢ for each Share purchased pursuant to this Offer, with a minimum fee of \$100.00, and also will be reimbursed for certain out-of-pocket expenses. The Depositary will receive reasonable compensation for its services and in addition the Collecting Dealers and the Depositary will be reimbursed for certain out-of-pocket costs in connection herewith. G & W has also retained D. J. King & Co., Inc., 20 Exchange Place, New York, N.Y. 10005 to render advisory and orientation services in connection with this Offer. D. J. King will receive a fee of approximately \$50,000 for its services plus reimbursement of out-of-pocket expenses.

8. **Extension of Tender Period.** G & W reserves the right to extend this Offer at any time and from time to time by notice of such extension to the Depositary.

9. **Miscellaneous.** This Offer is not being made to, nor will G & W accept tenders from, holders of Shares in any state of the United States or province of Canada in which the invitation or the acceptance thereof would not be in compliance with the securities or blue-sky laws of such state or province. In those states of the United States where securities laws require this Offer to be made by a licensed broker or dealer, this Offer is made on behalf of G & W by one or more registered brokers or dealers who are licensed under the laws of such states.

Tender Offer to Purchase Common Stock of A&P

G & W reserves the absolute right to reject any and all tenders not in proper form or to waive any irregularities or conditions of tender, and G & W's interpretation of the terms and conditions of this Offer (including the instructions in the Letter of Tender) will be final.

G & W has filed with the Securities and Exchange Commission a statement pursuant to Rule 14d-1 of the General Rules and Regulations under the Securities Exchange Act of 1934 furnishing certain information with respect to this Offer.

Questions or requests for assistance or for copies of this Offer and the Letter of Tender may be directed to the Dealer Manager, the Depository or

D. E. KING & CO., INC.

20 Exchange Place
New York, New York 10005
(212) 267-5550 (Collect)

2 North Riverside Plaza
Chicago, Illinois 60606
(312) 336-5581 (Collect)

Gulf & Western Industries, Inc.

Gulf & Western Plaza
New York, New York 10007

The Letter of Tender and certificates for your Shares should be sent by you, your broker or bank or trust company to the Depository as follows:

Depository:

Manufacturers Hanover Trust Company

Corporate Trust Department
4 New York Plaza — 10th Floor
New York, New York 10005

The Dealer Manager for this Offer is:

Kidder, Peabody & Co.

Incorporated

10 Hanover Square, New York, New York 10005

THIS OFFER IS MADE
Pursuant to the Tender Offer for Shares of Common Stock of
The Great Atlantic & Pacific Tea Company, Inc.

tendered pursuant to the Offer of February 1, 1973 of

Gulf & Western Industries, Inc.

to purchase 3,750,000 Shares of A & P Common Stock for cash at \$20 net per share

Shares of Common Stock of The Great Atlantic & Pacific Tea Company, Inc. ("A & P") may be tendered pursuant to this Offer to purchase on or after February 1, 1973 of Gulf & Western Industries, Inc. ("G & W") by completing and returning this Letter of Tender, together with the certificates representing the Shares of A & P Common Stock being tendered, to the Depository at the following address:

MANUFACTURERS HANOVER TRUST COMPANY

CORPORATE TRUST DEPARTMENT
4 NEW YORK PLAZA — 10TH FLOOR
NEW YORK, NEW YORK 10005

Tender Offer to Purchase Common Stock of A&P

Please fill in all applicable blocks, follow all instructions carefully and sign this Letter of Tender in the space provided below. Any uncompleted Letter of Tender may be returned to you, and the resulting delay could impair your rights under the Offer.

The method you use to deliver this Letter of Tender and any accompanying certificates representing shares of A&P Common Stock is at your option and risk, and delivery will be deemed effective only when actually received by the Depository. If delivery is by mail, it is suggested that insured, registered mail be used.

I. DESCRIPTION OF COMMON STOCK TENDERED

Your name and address should be printed below as they appear on one or more of your certificates representing shares of A&P Common Stock. Enter the certificate number(s) and the number of shares of A&P Common Stock that you wish to tender in the boxes indicated.

| | | | | | |
|---|--|--|--|--------------------|---|
| Tax Identification or Social Security Number: | | | | | |
| Name and Address: | | | | Certificate Number | Number of Shares Represented by Certificate |
| | | | | | Number of Shares Tendered from Certificate* |
| | | | | | |
| | | | | | |
| | | | | | |

* If you desire to tender less than all the shares which are evidenced by any certificate which you enclose, please indicate in this column the number which you wish to tender. Otherwise, it will be assumed that all the shares evidenced by the enclosed certificates are tendered.

II. SPECIAL PAYMENT INSTRUCTIONS

To be completed ONLY if proceeds are to be paid to other than the registered holder(s) or to be mailed to an address other than that given above.

Issue and mail check to:

Name _____

(print)

Address _____

Zip Code _____

III. SOLICITED TENDERS

If a member of any national securities exchange or the National Association of Securities Dealers, Inc. or a foreign dealer who has agreed in connection with the Offer to conform to the Rules of Fair Practice of such Association or any commercial bank or trust company solicited this tender, provide the following information:

Name of Firm _____

Individual _____

Address, City, State and Zip Code _____

The acceptance of compensation by such firm will constitute a representation that such firm has not engaged in any activity prohibited by the Securities Exchange Act of 1934 or the applicable rules and regulations thereunder in connection with such solicitation.

IV. SIGNATURE

The undersigned hereby tenders in accordance with the terms of the Offer to Purchase made by C&W Industrial, Inc. to holders of the Common Stock of The Great Atlantic & Pacific Tea Company, Inc. the shares of A&P Common Stock (the "Tendered Shares") described above under "Description of Common Stock Tendered" and, subject to payment of the purchase price, the undersigned hereby sells, assigns and transfers to C&W all right, title and interest in the Tendered Shares or if fewer than all of the Tendered Shares are accepted by C&W, that portion of the Tendered Shares accepted by C&W pursuant to the terms of the Offer. The undersigned represents that the undersigned has authority to tender and sell without restriction the Tendered Shares to C&W and that C&W will acquire good and unencumbered title thereto free and clear of all liens, restrictions, charges and encumbrances and not subject to any adverse claim. The undersigned will upon request execute any additional documents necessary or desirable to complete the sale and transfer of the Tendered Shares.

Tender Offer to Purchase Common Stock of A&P

Please deliver the check in payment for the Tendered Shares purchased to the undersigned at the address specified below unless otherwise indicated under "Special Payment Instructions" above.

All authority herein conferred or agreed to be conferred shall survive the death or incapacity of the undersigned and all obligations of the undersigned hereunder shall be binding upon the heirs, personal representatives, successors and assigns of the undersigned.

The undersigned hereby constitutes the Depositary attorney with respect to the Tendered Shares, with full power of substitution, to deliver the Tendered Shares together with all accompanying evidences of authority, to or upon the order of G & W in exchange for cash to which the undersigned is entitled, to or to be transferred the Tendered Shares on the books of A & P and to otherwise exercise all rights of beneficial ownership of the Tendered Shares. Delivery by the Depositary of the Tendered Shares to G & W shall be conclusive as to the performance of all conditions necessary to make this Letter of Tender effective.

Dated: _____
(please date)

Area Code and Telephone Number _____

(Signature(s) of Shareholder(s)) _____

(Must be signed by registered holder(s), exactly as name(s) appear in certificate(s), or by person(s) authorized to become registered holder(s) by certificate(s) and documents transmitted.)

Name _____

Address _____

Signature(s) guaranteed by (See Instruction 3): _____

INSTRUCTIONS

1. Each holder of A & P Common Stock desiring to accept the offer must, as soon as possible, mail or deliver this Letter of Tender, completely filled in and signed as specified herein, together with the certificates representing such shares (unless evidence has been furnished as provided), and all documents required below, if any, to the Depositary. This Letter of Tender and other required documents must be received by 5:00 P.M. Eastern Standard Time on January 13, 1971, unless the Offer is extended. Delivery will be deemed effective only when received by the Depositary.

2. No stock transfer tax stamps or fees to cover such stamps need accompany this instrument. G & W will pay all stock transfer taxes applicable to the transfer and sale to it. However, if payment of the purchase price is to be made to an assignee of the purchaser holder or if declared dividends are not received in the name of the person signing the Letter of Tender, the amount of any stock transfer taxes payable in payment of the transfer to such assignee or such person will be deducted from the purchase price if evidence of the payment of such taxes is submitted.

3. If the Letter of Tender is signed by the registered holder of the certificates being tendered, the tendered certificates should not be endorsed (except as hereinafter provided). Instead, the accompanying Letter of Tender must be duly executed with signatures guaranteed by a commercial bank or trust company located in New York City or located in the United States and having a correspondent in New York City or by a member of the New York or American Stock Exchange. If payment for any shares of A & P Common Stock is to be made in a name other than that in which the Tendered Shares are registered, the tendered certificates must be properly endorsed or accompanied by a properly executed stock power, and the signatures thereon, as well as on the Letter of Tender, must be guaranteed as provided above.

4. If the Letter of Tender is signed by other than the registered holder of the certificates being tendered, the certificates must be properly endorsed or accompanied by a properly executed stock power, the signatures on either case being guaranteed as provided in Instruction 3. In addition, the accompanying Letter of Tender must be duly executed, with signatures guaranteed as provided in Instruction 3.

5. In case of joint ownership, all joint owners must sign Letters of Tender submitted by trustees, executors, administrators, guardians, officers of corporations, attorneys-in-fact or others acting in a fiduciary capacity must be accompanied by evidence satisfactory to the Depositary as to the signer's authority to sign.

6. G & W reserves full discretion to determine whether the documentation with respect to Tendered Shares of A & P Common Stock is complete, and generally to determine all questions as to tenders, including the date of receipt of a tender, the propriety of execution of any document and other questions as to the propriety or acceptability of any tender. Any irregularities in connection with tenders must be cured within such time as G & W shall determine, unless waived. G & W reserves full discretion to waive any defect or irregularity in any tender as provided for herein, and upon such waiver it may treat and receive any such defective or irregular tender as if no such defect or irregularity had been present. Tenders will not be deemed to have been made until all such irregularities have been cured or waived. Payment will be made as promptly as practicable after acceptance.

GUARANTEE OF DELIVERY

(To Be Used Only if Certificates Are Not Transmitted Herewith)

The undersigned,

- ☐ a member of a national securities exchange,
☐ a commercial bank,
☐ a trust company,
☐ a member of the N.A.S.D.,

guarantees to deliver to the Depositary certificates for the shares tendered by this Letter of Tender not later than five business days after the expiration of the Offer.

Firm _____

Sign Here _____
Authorized Signature

Area Code and Tel. No. _____

Address _____

GULF & WESTERN NOTICE OF MOTION TO DISMISS
THE UNITED STATES DISTRICT COURT (Filed June 14, 1973)
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x

| | | |
|--------------------------------------|---|-------------------------|
| FRED LOWENSCHUSS, Trustee for Fred | : | |
| Lowenschuss Associates Pension Plan, | : | |
| Individually and on behalf of all | : | |
| other persons and shareholders of | : | |
| Great Atlantic & Pacific Tea Co., | : | |
| Inc. who are similarly situated, | : | |
| Plaintiffs, | : | Civil Action No. |
| | : | 73 Civ. 2021 |
| | : | (KTD) |
| vs. | : | |
| | : | <u>NOTICE OF MOTION</u> |
| W. J. KANE, H. J. BERRY, | : | |
| R. M. BROWN, JR., W. CORBUS, | : | |
| D. K. DAVID, H. C. GILLESPIE, | : | |
| J. S. KROH, E. A. LE PAGE, | : | |
| R. F. LONGACRE, M. D. POTTS, | : | |
| J. M. SCHIFF, P. A. SMITH, | : | |
| H. TAYLOR, JR., E. J. TONER, | : | |
| W. I. WALSH, N. F. WHITTAKER, | : | |
| J. A. ZEIGLER (all of whom are | : | |
| officers and directors of | : | |
| Great Atlantic & Pacific Tea | : | |
| Co., Inc.) and GREAT ATLANTIC & | : | |
| PACIFIC TEA CO., INC. and C. G. | : | |
| BLUHDORN and GULF & WESTERN | : | |
| INDUSTRIES, INC. and KIDDER, | : | |
| PEABODY & CO., | : | |
| Defendants. | : | |

----- x

S I R S:

PLEASE TAKE NOTICE that pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure the undersigned will move this Court for an order dismissing the complaint herein on the ground that the complaint fails to state a claim upon which relief can be granted, as is more particularly set forth in the annexed affidavit of John A. Guzzetta, sworn to on the 13th day of June, 1973, before the Honorable Kevin T. Duffy in Courtroom 128, United States Courthouse, Foley Square, New York, New York, on the 3rd day of July, 1973,

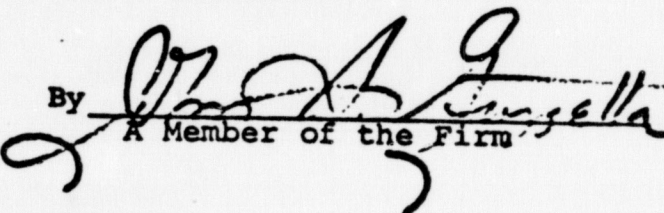
at 9:30 o'clock in the forenoon of that day, or as soon
thereafter as counsel can be heard.

19a

Dated: New York, New York
June 14, 1973

SIMPSON THACHER & BARTLETT
Attorneys for Defendants
C. G. Bluhdorn and Gulf &
Western Industries, Inc.
Office and P. O. Address
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

By


A Member of the Firm

TO:

MESSRS. CAHILL GORDON & REINDEL
Attorneys for Defenant Officers
and Directors of Great Atlantic
& Pacific Tea Co., Inc. and De-
fendant Great Atlantic & Pacific
Tea Co., Inc.
80 Pine Street
New York, New York

MESSRS. SULLIVAN & CROMWELL
Attorneys for Defendant
Kidder, Peabody & Co.
48 Wall Street
New York, New York

FRED LOWENSCHUSS ASSOCIATES
Attorneys for Plaintiff
1822 Two Penn Center Plaza
Philadelphia, Pennsylvania 19102

AFFIDAVIT OF JOHN A. GUZZETTA IN SUPPORT OF MOTION
THE UNITED STATES DISTRICT COURT (Dated June 13, 1973)

20a

FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x

FRED LOWENSCHUSS, Trustee for Fred :
Lowenschuss Associates Pension Plan, :
Individually and on behalf of all :
other persons and shareholders of :
Great Atlantic & Pacific Tea Co., :
Inc. who are similarly situated, :

Plaintiffs, :

(Civil Action No. :
73 Civ. 2021 :
(KTD)

vs. :

AFFIDAVIT

W. J. KANE, H. J. BERRY, :
R. M. BROWN, JR., W. CORBUS :
D. K. DAVID, H. C. GILLESPIE, :
J. S. KROH, E. A. LE PAGE, :
R. F. LONGACRE, M. D. POTTS, :
J. M. SCHIFF, P. A. SMITH, :
H. TAYLOR, JR., E. J. TONER, :
W. I. WALSH, N. F. WHITTAKER, :
J. A. ZEIGLER (all of whom are :
officers and directors of :
Great Atlantic & Pacific Tea :
Co., Inc.) and GREAT ATLANTIC & :
PACIFIC TEA CO., INC. and :
C. G. BLUHDORN and GULF & :
WESTERN INDUSTRIES, INC. and :
KIDDER, PEABODY & CO., :

Defendants. :

----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN A. GUZZETTA, being duly sworn, deposes and
says:

1. I am a member of the firm of Simpson Thacher &
Bartlett, attorneys of record for defendants Charles G.
Bluhdorn ("Mr. Bluhdorn") and Gulf & Western Industries, Inc.
("G&W") and I am fully familiar with all of the facts herein-
after set forth.

2. This affidavit is submitted in support of the motion by the aforesaid defendants for dismissal of the complaint.

Factual Background

3. On February 1, 1973, G&W publicly announced its intention to make a tender offer for 3,750,000 shares of the common stock of The Great Atlantic & Pacific Tea Company ("A&P"), constituting approximately 15% of A&P's issued and outstanding 24,875,224 shares. During the year prior to the tender offer, G&W had acquired approximately 4.2% of A&P shares by purchases on the open market.

Basically, the terms of the tender offer as extended were as follows:

(a) G&W offered to purchase each share tendered up to a maximum of 3,750,000 shares at \$20 per share through the close of business, February 13, 1973, the date of expiration.

(b) G&W could purchase any additional shares tendered on a pro rata basis at \$20 per share. On February 9, 1973 and at the hearing in this Court, however, G&W announced that it would purchase only 3,750,000 shares and it has, accordingly, returned all shares tendered in excess of that number.

(c) G&W stated and maintains that its proposed purchase of the A&P shares pursuant to the offer was to be an investment.

(d) The offer has since been extended to June 15, 1973, with respect to only those shares, net of withdrawals,

now held by Manufacturers Hanover Trust Company, the Depository. No other shares will be accepted.

4. The categorically negative response of A&P's management to the tender offer was swift. On February 2, 1973, A&P management caused a press release to be issued indicating its intent to "vigorously oppose" the tender offer. A&P's management, without consulting any investment banker or other advisor as to the adequacy of G&W's offer, determined instantly to oppose it in every conceivable way, and by press release attacked the price of \$20 per share as "inadequate and not in the best interest of our shareholders." It was undisputed that A&P's stock had not traded for as high as \$20 a share during the six months preceding the offer; its dividend had been cut significantly in recent years and on January 4, 1973 was omitted.

5. During the weekend of February 3-4, 1973, A&P's management mailed a letter to each of its shareholders and caused it to be in nationally circulated newspapers. The letter, in essence, (a) restated the claim that the price of \$20 per share was "inadequate" for the A&P stock; (b) claimed that G&W was trying to acquire A&P stock at a bargain price; and (c) asserted that A&P lawyers were investigating the possibility of antitrust violations, in obvious preparation for court action to interdict the offer.

Procedural Background of the Instant Action

6. This action was commenced on February 15, 1973 in the United States District Court for the Eastern District

of Pennsylvania (Civil Action No. 73-339). (A copy of the complaint is annexed hereto and made a part hereof as Exhibit A.) Jurisdiction is assertedly based on unspecified sections of the Securities Act of 1933, 15 U.S.C. §77a et seq., the Securities Exchange Act of 1934, 15 U.S.C. §78 et seq. (the "1934 Act"), and rules of the Securities and Exchange Commission promulgated thereunder. Plaintiff is an attorney suing as trustee of a pension plan which allegedly purchased 2,000 shares of A&P on February 2, 1973, one day after the announcement of G&W's tender offer, and tendered them to G&W on February 13, 1973. Plaintiff claims to represent a class comprised of all A&P shareholders who tendered their shares in the G&W tender offer and seeks "damages" of \$75,000,000, the total amount G&W had offered to pay for the 3,750,000 A&P shares.

7. According to plaintiff, the essence of the instant complaint as against G&W and Mr. Bluhdorn is "to enforce consummation of the tender offer". Complaint in Lowenschuss v. Gulf & Western Industries, Inc., Civ. No. 73-1024, (E.D. Pa., filed on May 7, 1973) ¶¶18, 32, discussed infra, paragraph 9.

8. On March 16, 1973, defendant A&P moved to transfer this action from the Eastern District of Pennsylvania to this Court pursuant to 28 U.S.C. §1404(a). On or about March 26, 1973, defendant Mr. Bluhdorn, chairman of G&W and its chief executive officer, moved in the Eastern District of Pennsylvania to dismiss the complaint or quash the purported service of process on the grounds that he had been improperly served and had no contacts with Pennsylvania

which would support jurisdiction in the Eastern District of Pennsylvania. On April 2, 1973, the Eastern District of Pennsylvania, pursuant to a memorandum and order of the Honorable Clarence Newcomer, ordered that the action be transferred to this Court and that all further proceedings be stayed until further order of this Court. On May 4, 1973, the original record and certified copy of docket entries in the Eastern District of Pennsylvania were transferred to this Court where they were filed on May 7, 1973.

9. On May 7, 1973, plaintiff filed in the United States District Court for the Eastern District of Pennsylvania a second purported class action against G&W, Mr. Bluhdorn and Kidder, Peabody & Co., Inc. ("Kidder"), the dealer-manager of the tender offer, alleging, inter alia, that they had violated Sections 9, 10(b), 14(d) and 14(e) of the 1934 Act (15 U.S.C. §§78i, 78j and 78n) and seeking compensatory, punitive and exemplary damages. The motion of defendants Mr. Bluhdorn and G&W under 28 U.S.C. §1404(a) to transfer the second action to this Court is pending in the Eastern District of Pennsylvania; the answer of the said defendants was filed June 4, 1973.

Procedural Background of Gulf
& Western Industries, Inc. v.
The Great Atlantic & Pacific
Tea Company, Inc.

10. An action entitled Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Company, Inc. ("G&W v. A&P") was commenced in this Court on February 5, 1973 (Civil Action No. 73 Civ. 536 (KTD)). The complaint alleged that A&P had made false and misleading statements

in opposing G&W's tender offer in violation of the 1934 Act. G&W presented an order to show cause on its motion for a preliminary injunction against A&P and requested a temporary restraining order. On the same day, A&P answered the complaint, denying its material allegations, and alleging several counterclaims against G&W and third-party defendants Mr. Bluhdorn and Kidder under the 1934 Act, §1 of the Sherman Act, 15 U.S.C. §1, and §7 of the Clayton Act, 15 U.S.C. §18. A&P also applied for an order to show cause and a temporary restraining order. On February 6, 1973, both orders to show cause were signed and made returnable February 9, 1973 and both applications for temporary restraining orders were denied.

11. On February 7-8, 1973, G&W and A&P conducted limited deposition discovery proceedings. On February 9, 1973, a hearing was held on the cross-motions for preliminary injunction, at the conclusion of which this Court reserved decision. On February 13, 1973, the original date of expiration of the tender offer, this Court filed its decision denying G&W's motion and granting A&P's motion; simultaneously this Court enjoined G&W from proceeding with the consummation of the tender offer.

12. The same day, February 13, 1973, G&W filed its notice of appeal which was expedited by the United States Court of Appeals for the Second Circuit on February 20, 1973.

13. On March 12, 1973, the Second Circuit affirmed this Court's injunction, G&W v. A&P, CCH Fed. Sec. L. Rep. ¶93,814, holding in pertinent part that there was a substantial probability of success on the merits regarding certain

of A&P's claims that G&W's acquisition of stock would violate §7 of the Clayton Act. Id. at 93,485-87. The Second Circuit rejected G&W's position that without control over the policies and practices of A&P ". . . the feared horizontal, vertical and reciprocal practices are no more likely to occur than they were with G&W entirely out of the A&P corporate picture." Id. at 93,485. The Second Circuit also held that the record demonstrated A&P's probability of success on the merits as to its claims of securities law violations, Id. at 93,489, which were intertwined with the anti-merger claims.

14. G&W v. A&P is on remand to this Court for trial on the merits. On May 29, 1973, this Court entered an order, pursuant to stipulation of counsel, staying all discovery proceedings for 45 days.

Reasons for Dismissal of the
Instant Action

15. The instant complaint seeks to enforce the tender offer, consummation of which has been preliminarily enjoined by this Court and the Second Circuit. Plaintiff has no longstanding interest in the fortunes of A&P but even if he did, the Second Circuit's opinion in G&W v. A&P makes clear that any interest of A&P shareholders must yield to the public interest. A determination, as here, that the tender offer cannot go forward gives plaintiff no right to enforce the offer.

16. There is no doubt that the Second Circuit barred any consummation of the tender offer. That Court was presented with vigorous arguments urging its consummation

on various terms and rejected them all. The nature of the arguments and the form of rejection merit attention because the instant complaint attempts to achieve what this Court and the Second Circuit have already rejected in a manner virtually foreclosing any other result upon the entry of a permanent injunction.

17. Plaintiff petitioned to intervene and/or file a brief amicus curiae in G&W v. A&P before the Second Circuit. In his petition, plaintiff specifically argued that consummation of the tender offer (with, if necessary, appropriate provision for G&W's subsequent divestiture of A&P shares) would be in the public interest and in the interest of tendering A&P shareholders (§§ 11, 12 and 14 of the Petition to Intervene and/or File a Brief Amicus Curiae, annexed hereto and made a part hereof as Exhibit B).

18. In his supporting affidavit, plaintiff specifically suggested that the Second Circuit "may avail itself of the remedy of sterilization (allowing consummation of the tender offer with deprivation of voting rights) or other directives to Gulf & Western and Mr. Bluhdorn, pertaining to divesture [sic] of Bohack and/or whatever remedies the Court may fashion." (§ 3 Affidavit Sur Petition to Intervene and/or File a Brief Amicus Curiae, annexed hereto and made a part hereof as Exhibit C). Plaintiff also suggested to the Second Circuit that "the tendering shareholders will only have been misled and injured if Gulf & Western is not permitted to pay for the tendered shares" (Id. ¶7).

19. In his Second Circuit brief, plaintiff again urged "sterilization" of the A&P shares acquired by G&W pending final adjudication (Brief Amicus Curiae on Behalf of Tendering Shareholders of A&P at 12, annexed hereto and made a part hereof as Exhibit D).

20. Two other amici curiae in the Second Circuit, both of which singly had tendered substantially more shares than plaintiff, argued for consummation of the tender offer, namely, the Josephine H. McIntosh Foundation, Inc., owner of 1,100,000 A&P shares which tendered 200,000 shares, and Neuberger & Berman, a registered broker-dealer, which had tendered 30,000 shares for its own account and 8,000 shares for the accounts of its customers. The latter also argued for specifically tailored injunctions to remedy the claimed horizontal and vertical antitrust violations in lieu of an injunction forbidding consummation of the tender offer.

21. G&W vigorously asserted both in this Court and in the Second Circuit that the tender offer was legal and ought to be consummated.

22. Notwithstanding these various arguments, the Second Circuit squarely rejected the limited remedy of "sterilization" suggested by plaintiff, the specifically tailored injunctive relief urged by Neuberger & Berman, and the broader relief urged by G&W and the Josephine H. McIntosh Foundation that the tender be consummated. The Second Circuit categorically determined (CCH Fed. Sec. L. Rep. at 93,489):

"A&P shareholders, moreover, like G&W, have no inherent right to proceed with an unlawful tender; a requirement of lawfulness is included by implication in every tender offer."

23. The Second Circuit's disposition granted preliminarily the relief sought by A&P on the merits. The posture of G&W v. A&P is such, therefore, that G&W is under an enormous burden of endeavoring to demonstrate in that case the lawfulness of the tender offer. While in no way impairing G&W's right to defend other actions growing out of the tender offer, including the second action filed by plaintiff, the Second Circuit's disposition as a practical matter, has precluded consummation of the tender offer and made it impossible.

24. The Second Circuit plainly recognized this fact in pointing to G&W's right, should the preliminary injunction be dissolved and a permanent injunction refused, to renew its offer to A&P shareholders:

"[I]f after trial on the merits G&W is vindicated, it will not be foreclosed from renewing its tender offer." G&W v. A&P, supra at 93,489.

25. It would serve no useful purpose and would defeat the goal of judicial economy for plaintiff to have another and collateral bite at the apple by seeking consummation of the tender offer in this Court. Plaintiff, as he urges in his second complaint, is not without a remedy if G&W is held legally responsible in any way for failure of the tender offer. While we feel his allegations lack merit, he will be given relief under his second complaint if appropriate.

WHEREFORE, for the foregoing reasons, the instant complaint should be dismissed.

Respectfully submitted,

John A. Guzzetta
John A. Guzzetta

Sworn to before me this
13th day of June, 1973

Lois Davenport
Notary Public
LOIS DAVENPORT
Notary Public, State of New York
No. 43-6667410
• Qualified in Richmond County
Certificate filed in New York County
Commencement Expires March 30, 1978

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT OF
JOHN A. GUZZETTA

EXHIBIT A - COMPLAINT
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

30a

FRED LOWENSCHUSS, TRUSTEE FOR
FRED LOWENSCHUSS ASSOCIATES
PENSION PLAN, INDIVIDUALLY AND
ON BEHALF OF ALL OTHER PERSONS
AND SHAREHOLDERS OF GREAT
ATLANTIC & PACIFIC TEA CO., INC.
WHO ARE SIMILARLY SITUATED,

PLAINTIFFS

vs.

W. J. KANE, H. J. BERRY,
D. M. BROWN, JR., W. CORBUS,
D. K. DAVID, H. C. GILLESPIE,
J. S. KROH, E. A. LEPAGE,
R. F. LONGACRE, M. D. POTTS,
J. U. SCHIFF, P. A. SMITH,
H. J. TAYLOR, JR., E. J. TONER,
W. I. WALSH, N. F. WHITTAKER,
J. A. ZEIGLER (ALL OF WHOM ARE
OFFICERS AND DIRECTORS OF
GREAT ATLANTIC & PACIFIC TEA
CO., INC.) AND
GREAT ATLANTIC & PACIFIC TEA
CO., INC. AND
C. G. BLUHDORN AND
GULF & WESTERN INDUSTRIES, INC.
AND KIDDER, PEABODY & CO.

DEFENDANTS

: CIVIL ACTION NO. 73-337
:
: CLASS ACTION
: SECURITIES ACT OF 1933
: SECURITIES EXCHANGE ACT
: OF 1934
:
: CONSPIRACY
: MISREPRESENTATION, FRAUD
: AND DECEIT
:
: COMPENSATORY, EXEMPLARY
: AND PUNITIVE DAMAGES

| | |
|----------------|---------|
| Ligation Dept. | |
| Filed | 2/14/73 |
| Served | |
| Served | |
| Postmark | |
| Exemplary | |
| Damages | |
| Entered | |
| Diary | |
| Register | ✓ |
| Searched | |

FILED

FEB 15 1973

JOHN J. [Signature]
By _____ Dep. Clerk

COMPLAINT

AND NOW, COMES THE PLAINTIFF, FRED LOWENSCHUSS ASSOCIATES PENSION PLAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, BY AND THROUGH THEIR TRUSTEE AND COUNSEL, FRED LOWENSCHUSS ASSOCIATES, AND FOR THEIR CLAIMS AGAINST THE DEFENDANTS, ALLEGE AND STATE, UPON KNOWLEDGE, INFORMATION AND BELIEF THE FOLLOWING:

1. THE NAMED PLAINTIFF IS THE TRUSTEE OF A PENSION PLAN, WHICH PENSION FUND, AT ALL TIMES RELEVANT HERETO, OWNED TWO THOUSAND SHARES OF COMMON STOCK OF GREAT ATLANTIC & PACIFIC TEA CO., INC., WHICH IT PROPERLY TENDERED ON TUESDAY, FEBRUARY 13, 1973, THROUGH ITS AUTHORIZED STOCK BROKER, HERZFELD AND STERN, TO GULF & WESTERN INDUSTRIES, INC., THROUGH ITS DESIGNATED DEPOSITORY, THE MANUFACTURERS HANOVER TRUST COMPANY.

2. THIS ACTION IS BROUGHT ON BEHALF OF THE NAMED PLAINTIFF AS THE TRUSTEE, AND ON BEHALF OF ALL OTHER PERSONS AND/OR ENTITIES SIMILARLY SITUATED.

3. DEFENDANT, KIDDER, PEABODY & CO., IS THE INVESTMENT BANKER AND AGENT OF DEFENDANT, GULF & WESTERN, INC. AT ALL TIMES RELEVANT HERETO.

4. THE DEFENDANT, GULF & WESTERN INDUSTRIES, INC., IS A PUBLIC CORPORATION TRADED ON THE NEW YORK STOCK EXCHANGE WITH MANY DIVERSIFIED HOLDINGS, WHICH DEFENDANT CORPORATION IS COMMONLY REFERRED TO AS A CONGLOMERATE.

5. DEFENDANT, CHARLES BLUHDORN, IS THE CHAIRMAN OF THE BOARD AND CHIEF OPERATING OFFICER OF GULF & WESTERN INDUSTRIES, INC., WHO IS ALSO A SHAREHOLDER HIMSELF IN MANY DIFFERENT PUBLIC CORPORATIONS.

6. GREAT ATLANTIC & PACIFIC TEA CO., INC., IS A PUBLIC CORPORATION, WHOSE STOCK IS TRADED ON THE NEW YORK STOCK EXCHANGE, AND WHICH COMPANY HAD APPROXIMATELY 24,875,224 SHARES OF COMMON STOCK OUTSTANDING AT THE TIME IN QUESTION, OF WHICH APPROXIMATELY 7.9 MILLION SHARES OF COMMON STOCK WERE IN THE HANDS OF THE GENERAL PUBLIC.

7. ALL OTHER NAMED DEFENDANTS HEREIN ARE OFFICERS AND DIRECTORS OF GREAT ATLANTIC & PACIFIC TEA CO., INC. AND SAID PERSONS ARE BEING SUED IN THEIR OWN RIGHT AS WELL AS IN THEIR CAPACITY AS OFFICERS, DIRECTORS AND AGENTS OF DEFENDANT, GREAT ATLANTIC & PACIFIC TEA CO., INC.

JURISDICTION

8. THIS COURT'S JURISDICTION OF THIS ACTION IS BASED ON THE SECURITIES ACT OF 1933, THE SECURITIES EXCHANGE ACT OF 1934, THE RULES AND REGULATIONS PROMULGATED THEREUNDER BY THE SECURITIES EXCHANGE COMMISSION.

CLASS ACTION ALLEGATIONS

32a

9. THIS CLASS ACTION IS BROUGHT PURSUANT TO AND UNDER RULES 23(A) AND SPECIFICALLY 23(B)(1) AND/OR (B)(3) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

10. THIS ACTION IS BROUGHT ON BEHALF OF THE NAMED PLAINTIFFS AND ALL OTHER PERSONS OR ENTITIES WHO TENDERED COMMON SHARES OF STOCK OF THE GREAT ATLANTIC & PACIFIC TEA CO., INC., TOTALING 3,750,000 SHARES IN ACCORDANCE WITH THE TENDER OFFER MADE ON FRIDAY, FEBRUARY 2, 1973 BY DEFENDANT, GULF & WESTERN INDUSTRIES, INC.

11. THE CLASS REPRESENTED BY THE PLAINTIFF IS SO NUMEROUS AS TO MAKE IT IMPRACTICAL TO BRING ALL OF THE CLASS MEMBERS BEFORE THE COURT.

12. THE INDIVIDUAL AMOUNTS OF EACH OF THE LITIGANTS ARE RELATIVELY SMALL IN RELATION TO THE EXTENSIVE LITIGATION NECESSARY TO OBTAIN SATISFACTION AND REDRESS AGAINST DEFENDANTS HEREIN. HOWEVER, WHEN THE DAMAGES SUSTAINED BY THE PLAINTIFFS' CLASS ARE VIEWED IN THE AGGREGATE, THE DAMAGES ARE FANTASTICALLY LARGE AND BELIEVED TO BE IN THE MILLIONS OF DOLLARS, JUSTIFYING THE EXPENSE AND EFFORT IN THIS LEGAL ACTION.

13. COMMON QUESTIONS OF LAW AND FACT AFFECT THE RIGHTS OF EVERY CLASS MEMBER AND A COMMON RELIEF, DAMAGES, IS SOUGHT BY THE CLASS PLAINTIFFS.

14. COMMON QUESTIONS OF LAW AND FACT PREDOMINATE:

(A) THE RIGHT OF ALL SHAREHOLDERS WHO PROPERLY TENDERED THEIR SHARES OF STOCK IN GREAT ATLANTIC & PACIFIC TEA CO., INC. TO RECEIVE \$20.00 PER SHARE FOR THEIR TENDERED SHARES WITHIN FIVE DAYS OF FEBRUARY 13, 1973;

(B) THE IMPROPER ACTIONS OF DEFENDANT, GREAT ATLANTIC & PACIFIC TEA CO., INC., AND ITS OFFICERS AND DIRECTORS IN BRINGING ACTIONS TO ENJOIN CONSUMATION OF THE TENDER OFFER;

(c) THE BREACH OF FIDUCIARY RELATIONSHIP OF THE
OFFICERS AND DIRECTORS OF THE GREAT ATLANTIC & PACIFIC TEA CO.,
INC. TO ITS PUBLIC SHAREHOLDERS;

33a

(d) THE QUESTION OF IMPROPERLY PREPARING OF THE
TENDER OFFER BY DEFENDANTS, GULF & WESTERN INDUSTRIES, INC.,
ITS CHAIRMAN, CHARLES BLUHDORN AND/OR KIDDER, PEABODY & CO.

(e) WHETHER DEFENDANTS INDIVIDUALLY AND/OR IN DIFFERENT
COMBINATIONS ENGAGED IN ANY ACT, PRACTICE OR COURSE OF BUSINESS
WHICH OPERATED OR WOULD TEND TO OPERATE AS A FRAUD OR DECEIT
UPON PLAINTIFFS IN CONNECTION WITH THE TENDER OFFER AND THE ENJOIN-
ING OF OR THE CONSUMATION OF SAID OFFER;

(f) WHETHER DEFENDANTS, ANY ONE OR MORE OF THEM, ARE
LIABLE FOR EXEMPLARY OR PUNITIVE DAMAGES BY REASON OF THE WILFUL,
WANTON OR INTENTIONAL NATURE OF THEIR HARMFUL ACTS.

15. SEPARATE ACTIONS BY MEMBERS OF PLAINTIFFS' CLASS WOULD
CREATE A RISK OF ADJUDICATION OF SOME CLASS MEMBER'S RIGHTS,
WHICH, AS A PRACTICAL MATTER, WOULD BE DESPOSITIVE OF OTHER
MEMBERS' INTERESTS WHO ARE NOT PARTIES, OR WOULD IMPAIR OR IMPEDE
THEIR ABILITY TO PROTECT THEIR INTEREST.

16. SEPARATE ACTIONS BY MEMBERS OF PLAINTIFFS' CLASS
AGAINST DEFENDANTS WOULD CREATE A RISK OF INCONSISTENT ADJUDICATION
AS BETWEEN THE PARTIES, THEREBY CREATING INCONSISTENT STANDARDS
OF CONDUCT FOR THE DEFENDANTS.

17. THE NAMED PLAINTIFFS WILL ASSURE THE ADEQUATE REPRESENTATION
OF ALL MEMBERS OF THE CLASS, AND THEY CAN AND DO UNDERTAKE
HONORABLY TO REPRESENT THE CLASS. SAID PLAINTIFFS HAVE NO
INTEREST WHICH ARE ADVERSE TO THE CLASS AND COUNSEL, FRED
LOWENSCHUSS ASSOCIATES, WHO ARE CAPABLE AND COMPETENT ATTORNEYS,
WITH EXTENSIVE TRIAL EXPERIENCE, AND WITH CLASS ACTION EXPERIENCE,
WILL PROPERLY AND ADEQUATELY REPRESENT ALL THE MEMBERS OF THE
CLASS.

18. THE MAINTENANCE OF THIS SUIT AS A CLASS ACTION WOULD AID IN PREVENTING A MULTIPLICITY OF LITIGATION AGAINST THESE DEFENDANTS BY MEMBERS OF THE PLAINTIFFS' CLASS.

19. THIS IS THE ONLY KNOWN SUIT AGAINST THE DEFENDANTS HEREIN, STEMMING FROM THE CONDUCT COMPLAINED OF BY PLAINTIFF AND MEMBERS OF ITS CLASS.

20. AT THE TIME OF THE OCCURRENCES OF THE ACTS HEREINAFTER COMPLAINED OF, THE DEFENDANTS DID ACT ON THEIR OWN BEHALF AND THE CORPORATE DEFENDANTS HEREIN ACTED THROUGH THEIR AGENTS, SERVANTS, WORKMEN OR EMPLOYEES, ALL OF WHOM WERE AT ALL TIMES ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT AND IN FURTHERANCE OF THE ALLEGED INTEREST OF DEFENDANT CORPORATIONS AND IN FURTHERANCE OF THE ALLEGED BUSINESS OF SAID CORPORATE DEFENDANTS.

GENERAL ALLEGATIONS

21. ON FEBRUARY 2, 1973, DEFENDANT, GULF & WESTERN INDUSTRIES, INC., THROUGH ITS AUTHORIZED AGENTS, OFFICERS AND DIRECTORS, AND EMPLOYEES, AND THROUGH THE INVESTMENT BANKING HOUSE OF DEFENDANT, KIDDER, PEABODY & CO., MADE A PUBLIC OFFER AND COMMITMENT TO PURCHASE 3,750,000 SHARES OF COMMON STOCK OF THE GREAT ATLANTIC & PACIFIC TEA CO., INC., TO ANY AND ALL SHAREHOLDERS WHO TENDERED SAID SHARES OF STOCK ON OR BEFORE TUESDAY, FEBRUARY 13, 1973 AT 5:00 P.M., EASTERN STANDARD TIME, TO THE DEPOSITORY, MANUFACTURERS HANOVER TRUST COMPANY, AND DEFENDANT, GULF & WESTERN, AGREED TO PAY \$20.00 CASH, NET PER SHARE, FOR EACH SUCH SHARE PROPERLY TENDERED. PAYMENT TO BE MADE AS SOON AS PRACTICABLE, WHICH IS INTERPRETED AS BEING WITHIN FIVE DAYS IN ACCORDANCE WITH THE SALE AND PAYMENT FOR SECURITIES TRANSACTIONS.

22. THAT DEFENDANT, GULF & WESTERN, AND ITS CHIEF OPERATING OFFICER, CHARLES BLUHDORN, WARRANTED TO THE GENERAL PUBLIC THAT THE PURCHASE OF THE 3,750,000 SHARES IN QUESTION WAS FOR INVESTMENT PURPOSES AND THAT SAID DEFENDANTS HAD COMPLIED WITH ALL LAWS, RULES AND REGULATIONS PERTAINING TO SAID TENDER OFFER AND THAT THERE WERE NO LEGAL IMPEDIMENTS TO THE PURCHASE OF SAID SHARES FROM THE GENERAL PUBLIC.

23. DEFENDANT, KIDDER, PEABODY & CO., AS INVESTMENT BANKER AND SPECIALIST IN THE FIELD OF SECURITIES, AIDED AND ABETTED DEFENDANT, GULF & WESTERN, IN THE MAKING OF SAID OFFER TO THE GENERAL PUBLIC AND SAID INVESTMENT FIRM ALSO WARRANTED TO THE GENERAL PUBLIC THAT THE ACTIONS TAKEN BY THEIR CLIENT IN THE TENDER OFFER WERE LEGAL AND PROPER.

24. THE ACTIONS OF DEFENDANT, GULF & WESTERN, CHARLES BLUHDORN, AND KIDDER, PEABODY & CO., HAVE CAUSED WIDE PERCENTAGE FLUCTUATIONS IN THE QUOTED PRICE ON THE NEW YORK STOCK EXCHANGE OF THE COMMON STOCK OF THE GREAT ATLANTIC & PACIFIC TEA CO., INC., CAUSING THE GENERAL PUBLIC TO RE-EVALUATE THE VALUE OF THE COMMON STOCK OF A & P DUE TO THE OFFER OF PURCHASE AT \$20.00 PER SHARE, WHICH CAUSED SAID STOCK TO RISE IN VALUE FROM A LOW OF 14-3/8 TO A HIGH OF 18-7/8, WHEREBY CERTAIN INVESTORS RECEIVED MORE MONEY FOR THE SALE OF THEIR SHARES AND CERTAIN PURCHASERS PAID MORE MONEY FOR THEIR SHARES DUE TO THE ARTIFICIAL PEGGING OF THE PRICE OF THE COMMON STOCK CAUSED BY THE TENDER OFFER.

25. AT ALL TIMES RELEVANT HERETO, THE GREAT ATLANTIC & PACIFIC TEA CO., INC., AND ITS OFFICERS AND DIRECTORS WHO ARE THE NAMED DEFENDANTS HEREIN, OWED A FIDUCIARY DUTY TO ITS SHAREHOLDERS.

26. THAT IN BREACH OF SAID FIDUCIARY DUTY, THE OFFICERS AND DIRECTORS OF A & P AND THE CORPORATION ITSELF INSTITUTED A LAW SUIT TO ENJOIN GULF & WESTERN, INC., AND/OR KIDDER, PEABODY & CO., FROM PROCEEDING WITH THE TENDER OFFER TO PURCHASE AND PAY FOR THE 3,750,000 SHARES WHICH WERE PROPERLY TENDERED PURSUANT TO SAID OFFER BY PLAINTIFFS AND THE MEMBERS OF THEIR CLASS.

27. THAT SAID ACTIONS BY THE OFFICERS AND DIRECTORS OF A & P AND THE A & P COMPANY WERE IN BREACH OF THEIR FIDUCIARY RELATIONSHIP TO THEIR SHAREHOLDERS, AND SAID ACTIONS BY SAID DEFENDANTS HEREIN WERE MOTIVATED BY PERSONAL GAIN AND AGGRANDIZEMENT, AND TAKEN FOR THE SOLE PURPOSE FOR PERPETUATING THEIR EMPLOYMENT STATUS.

28. THAT THE ACTIONS OF A & P AND ITS OFFICERS AND DIRECTORS WERE NOT IN THE BEST INTEREST OF ITS SHAREHOLDERS AND WERE, IN ACTUALITY, DETRIMENTAL BOTH TO THE A & P COMPANY AND ITS SHAREHOLDERS IN THAT LARGE SUMS OF MONEY WERE CAUSED TO BE EXPENDED BY DEFENDANT, A & P FOR PURPOSES OF OPPOSING A TENDER OFFER WHICH WAS BENEFICIAL TO THE SHAREHOLDERS OF A & P AND NOT DETRIMENTAL TO THE A & P CORPORATION.

29. THAT THE OFFICERS AND DIRECTORS OF A & P EXPENDED MANY HOURS OF THEIR TIME AND THE TIME OF OTHER EMPLOYEES ON THE PAYROLL OF DEFENDANT, A & P, FOR THE PURPOSES OF WRONGFULLY OPPOSING AND DESTROYING THE TENDER OFFER AND THE OPPORTUNITY OF THE PUBLIC SHAREHOLDERS TO RECEIVE \$20.00 PER SHARE IMMEDIATELY FOR THEIR SHARES OF STOCK, WHICH WERE, AT THE TIME OF THE TENDER OFFER, SELLING AT A SUBSTANTIAL SUM LESS THAN \$20.00 ON THE NEW YORK STOCK EXCHANGE.

30. THE ACTIONS OF THE OFFICERS AND DIRECTORS OF A & P ALLEGEDLY ON BEHALF OF A & P, TO PREVENT THE PLAINTIFF CLASS OF SHAREHOLDERS FROM RECEIVING PROMPT PAYMENT OF \$75,000,000.00 FROM DEFENDANT, GULF & WESTERN, WERE A WILFUL AND WANTON INTERFERENCE IN THE CONTRACTUAL RELATIONSHIP AND BUSINESS DEALINGS BETWEEN THE PLAINTIFFS' CLASS AND DEFENDANT, GULF & WESTERN.

31. THAT EACH DAY THAT PAYMENT FOR THE TENDERED SHARES IS DELAYED, THE PLAINTIFF CLASS LOSES \$12,500.00 IN INTEREST.

32. THAT IN THE EVENT THE TENDER OFFER IS NOT CONSUMMATED, EXTENSIVE DAMAGES WILL BE SUFFERED BY PLAINTIFFS AND MEMBERS OF THE CLASS IN THAT THEIR STOCKHOLDINGS AND VALUE THEREOF WILL BE GREATLY REDUCED.

WHEREFORE, PLAINTIFFS, ON ITS OWN BEHALF, AND ON BEHALF OF ALL MEMBERS OF THEIR CLASS, DEMAND:

(A) THAT DEFENDANTS INDIVIDUALLY AND JOINTLY BE ORDERED TO PAY \$75,000,000.00 PLUS THE LEGAL RATE OF INTEREST FROM FEBRUARY 19, 1973 UNTIL THE DATE OF PAYMENT FOR ALL TENDERED SHARES;

(B) THAT DEFENDANTS INDIVIDUALLY AND/OR JOINTLY BE ORDERED TO PAY ANY AND ALL DAMAGES TO PLAINTIFF AND MEMBERS OF PLAINTIFFS' CLASS OCCASIONED BY THE ACTIONS OF SAID DEFENDANTS;

(C) IN THE EVENT A DETERMINATION IS MADE THAT DEFENDANT, GULF & WESTERN INDUSTRIES, INC., IS NOT PERMITTED TO ACCEPT THE SHARES AS TENDERED, THAT THE DEFENDANTS INDIVIDUALLY AND/OR JOINTLY BE ORDERED TO PAY ANY AND ALL DAMAGES AND LOSSES SUFFERED BY PLAINTIFF AND PLAINTIFFS' CLASS DUE TO THE ACTIONS OF SAID DEFENDANTS;

(D) THAT PUNITIVE AND EXEMPLARY DAMAGES BE ASSESSED AGAINST DEFENDANT, GREAT ATLANTIC & PACIFIC TEA CO., INC. AND ITS OFFICERS AND DIRECTORS FOR THEIR WILFUL AND WANTON INTERFERENCE WITH THE RIGHTS OF THE SHAREHOLDERS OF A & P TO RECEIVE PROMPT AND FULL PAYMENT FOR THE SHARES AS TENDERED;

(E) THAT DEFENDANT OFFICERS AND DIRECTORS OF A & P BE ORDERED TO REIMBURSE GREAT ATLANTIC & PACIFIC TEA CO., INC. FOR ALL EXPENSES AND LOST TIME OCCASIONED BY THEIR INTERFERING WITH THE PLAINTIFF CLASS FROM RECEIVING PROMPT PAYMENT FOR THE TENDERED SHARES;

(F) THAT DEFENDANTS INDIVIDUALLY AND JOINTLY BE REQUIRED TO PAY THE COSTS OF THIS LITIGATION, INCLUDING REASONABLE ATTORNEYS FEES AND COSTS OF GIVING NOTICE TO ALL MEMBERS OF PLAINTIFFS' CLASS.

(G) SUCH OTHER RELIEF AS THE COURT MAY DEEM NECESSARY AND PROPER IN THE INTEREST OF JUSTICE.

FRED LOWENSCHUSS ASSOCIATES

BY:

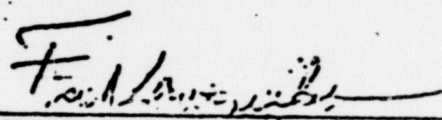

ATTORNEYS FOR PLAINTIFF

EXHIBIT B - PETITION TO INTERVENE AND/OR FILE
BRIEF AMICUS CURIAE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

39a

| | | |
|---------------------------------|---|--------------------|
| GULF & WESTERN INDUSTRIES, INC. | : | DOCKET No. 73-1223 |
| PLAINTIFF-APPELLANT | : | |
| VS. | : | |
| GREAT ATLANTIC & PACIFIC | : | |
| TEA CO., INC. | : | |
| DEFENDANT - THIRD PARTY | : | |
| PLAINTIFF - APPELLEE | : | |
| VS. | : | |
| CHARLES G. BLUHDORN | : | |
| AND | : | |
| KIDDER, PEABODY & Co. | : | |
| THIRD-PARTY DEFENDANT | : | |
| APPELLEE | : | |

PETITION TO INTERVENE AND/OR FILE A BRIEF AMICUS CURIAE

AND NOW, COMES FRED LOWENSCHUSS, ESQUIRE, AS TRUSTEE AND COUNSEL FOR THE PENSION PLAN OF FRED LOWENSCHUSS ASSOCIATES, AND HEREBY MOVES THIS COURT, PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 24 AND FEDERAL RULES OF APPELLATE PROCEDURE 27 AND 29 FOR AN ORDER PERMITTING HIM TO INTERVENE AS A PARTY-APPELLANT AND/OR GRANTING LEAVE TO FILE A BRIEF AMICUS CURIAE IN THIS ACTION.

THE FOLLOWING FACTS ARE ADVANCED FOR THE CONSIDERATION OF THIS COURT IN SUPPORT OF THIS MOTION:

1. PETITIONER HEREIN, THROUGH ITS PENSION PLAN, IS THE OWNER OF 2,000 SHARES OF COMMON STOCK OF THE GREAT ATLANTIC AND PACIFIC TEA CO., INC., WHICH IT PROPERLY TENDERED TO GULF & WESTERN INDUSTRIES, INC. ON FEBRUARY 13, 1973, IN ACCORDANCE WITH THE TENDER INSTRUCTIONS AND THE TERMS OF SAID TENDER.
2. ON FEBRUARY 13, 1973, THE HONORABLE KEVIN THOMAS DUFFY, A DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK, ISSUED AN ORDER IN THE FORM OF A PRELIMINARY INJUNCTION WHICH CAUSED GULF & WESTERN INDUSTRIES, INC. TO DELAY ACCEPTANCE OF THE TENDERED

SHARES AND PAYMENT THEREOF.

40a

3. ON FEBRUARY 15, 1973, YOUR PETITIONER INSTITUTED A CLASS ACTION IN THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF PENNSYLVANIA, CIVIL ACTION NO. 73-339 AGAINST THE GREAT ATLANTIC & PACIFIC TEA CO., INC. AND ALL OF ITS OFFICERS AND DIRECTORS; GULF & WESTERN INDUSTRIES, INC., AND CHARLES G. BLUMDORN, ITS CHAIRMAN; AND KIDDER, PEABODY & CO., ON BEHALF OF ALL TENDERING STOCKHOLDERS. A COPY OF SAID COMPLAINT IS ATTACHED HERETO AND MADE A PART HEREOF.

4. THE POSITION OF THE TENDERING SHAREHOLDERS HAS NOT BEEN REPRESENTED IN THE COURT BELOW AND MAY NOT BE PRESENTED AND/OR FULLY DEVELOPED IN THIS COURT.

5. THE PRESENT PARTIES OF RECORD DO NOT REPRESENT THE INTERESTS OF THE MINORITY SHAREHOLDERS, WHO HAVE TENDERED 3,750,000 SHARES AND ARE AWAITING PROMPT PAYMENT FOR SAME.

6. THE LITIGATION INVOLVING THE NAMED PARTIES HEREIN MAY BE EXTENSIVE, TIME CONSUMING AND PROTRACTED.

7. YOUR PETITIONER, ON ITS OWN BEHALF, AND ON BEHALF OF ALL TENDERING SHAREHOLDERS, FINDS HIMSELF IN THE POSITION OF HAVING A DETERMINATION MADE BY THE DISTRICT COURT WHICH GREATLY ADVERSELY EFFECTS THE INTERESTS OF THE TENDERING SHAREHOLDERS, ALTHOUGH THEIR INTERESTS WERE NOT REPRESENTED IN THE LOWER COURT PROCEEDINGS.

8. IT IS INHERENTLY UNFAIR THAT THIS LARGE GROUP OF MINORITY SHAREHOLDERS, WHO WILL SUFFER DAMAGES IN THE MILLIONS OF DOLLARS BY THE DELAY OF THE CONSUMMATION OF THE TENDER OFFER AND/OR THE DENIAL OF SAME, ARE NOT PERMITTED TO PRESENT THEIR POSITION TO THIS COURT.

9. IT SHOULD FURTHER BE NOTED THAT THIS TENDER OFFER AND THE RESULTANT LITIGATION AND ACTIONS SURROUNDING SAME, HAS CAUSED WIDE PERCENTAGE FLUCTUATION IN THE QUOTED PRICE OF THE COMMON STOCK OF THE GREAT ATLANTIC & PACIFIC TEA CO., INC., AND

HAS ADVERSELY EFFECTED THE ORDERLY MARKET IN SAID STOCK.

10. IN THE EVENT THE TENDER OFFER IS NOT PERMITTED TO PROCEED, THERE MAY BE FURTHER PRESSURE ON THE SELLING SIDE OF THE COMMON STOCK OF A & P, DUE TO THE FACT THAT A GOODLY PERCENTAGE OF THE 3,750,000 TENDERED SHARES MAY BE SOLD ON THE NEW YORK STOCK EXCHANGE SINCE THE SHAREHOLDERS HAVE SHOWN A DEFINITE INDICATION OF WANTING TO SELL THEIR SHARES.

11. IT IS THE POSITION OF THE PETITIONER HEREIN THAT THE RESOLUTION OF THE UNDERLYING SUBSTANTIVE ANTI-TRUST CONTROVERSY, PRESENTED IN THE ORIGINAL LITIGATION BETWEEN THE PARTIES HEREIN, SHOULD NOT CAUSE AN ADVERSE EFFECT TO THE TENDERING SHAREHOLDERS.

12. IT IS SUBMITTED THAT MUCH GREATER HARM WILL BE CAUSED THE SHAREHOLDERS AND THE GENERAL PUBLIC BY DELAYING OR PREVENTING THE CONSUMMATION OF THE TENDER OFFER, THAN THE HARM THAT MAY BE CAUSED IF THE TENDER OFFER IS ALLOWED TO PROCEED, AND AT SOME LATER DATE GULF & WESTERN MAY BE FOUND IN VIOLATION OF THE ANTI-TRUST LAWS AND ORDERED TO DIVEST ITSELF OF SAID SHARES.

13. IT IS SUBMITTED THAT IF DUPONT WERE ABLE TO DIVEST ITSELF OF ITS GENERAL MOTORS HOLDINGS, WHICH WERE MUCH GREATER AND MORE EXTENSIVE THAN THE PROPOSED HOLDINGS IN A & P BY GULF & WESTERN HEREIN, THAT GULF & WESTERN WOULD BE ABLE TO DIVEST ITSELF OF THESE SHARES IN QUESTION MUCH MORE READILY AND IN ORDERLY FASHION.

14. IN BALANCING THE EQUITIES, THE LOWER COURT HAS FAILED TO TAKE INTO CONSIDERATION THE EXISTENCE OF THE EQUITIES IN FAVOR OF THE TENDERING SHAREHOLDERS.

15. IF A LOSS IS TO BE SUFFERED DUE TO ANY IMPROPRIETY OR IMPROPER ACTION BY EITHER THE GREAT ATLANTIC & PACIFIC TEA CO., INC., AND/OR GULF & WESTERN INDUSTRIES, INC., KIDDER, PEABODY & CO., AND/OR THEIR RESPECTIVE OFFICERS AND DIRECTORS, IT SHOULD NOT BE BORNE BY THE TENDERING SHAREHOLDERS, AND IT SHOULD NOT BE ALLOWED TO EFFECT THE ORDERLY TRADING OF THE SHARES OF STOCK OF A & P.

WHEREFORE, PETITIONER HEREDY RESPECTFULLY REQUESTS THE FOLLOWING:

A. THAT PETITIONER BE PERMITTED TO INTERVENE AS A PARTY APPELLANT;

B. THAT PETITIONER BE PERMITTED TO PRESENT ORAL ARGUMENT, IN SUPPORT OF ITS POSITION AND THAT OF THE TENDERING SHAREHOLDERS, ON MARCH 9, 1973 IN ACCORDANCE WITH THE SCHEDULED ARGUMENT;

C. THAT PETITIONER BE PERMITTED TO FILE A BRIEF IN SUPPORT OF SAID OUTLINED POSITION, WHICH BRIEF WILL IN NO WAY DELAY THE SCHEDULED HEARING AND/OR THE DECISION TO BE RENDERED BY THIS COURT HEREIN, BUT WILL GIVE ADEQUATE TIME TO PETITIONER TO PREPARE AND PRESENT SAME;

D. THE PETITIONER REQUESTS THAT THE MATTER BE HEARD AS SCHEDULED ON MARCH 9, 1973.

RESPECTFULLY SUBMITTED,
FRED LOWENSCHUSS ASSOCIATES

BY:

Fred Lowenschuss

ATTORNEYS FOR PETITIONER
INTERVENOR

CERTIFICATE OF SERVICE

I, DOLORES M. KALLY, HEREBY CERTIFY THAT COPIES OF THE ANNEXED PETITION TO INTERVENE AND/OR FILE A BRIEF AMICUS CURIAE, WERE SERVED UPON THE FOLLOWING PERSONS BY MAIL, POSTAGE PREPAID, IN ACCORDANCE WITH THE FEDERAL RULES OF CIVIL PROCEDURE, ON THIS 21ST DAY OF FEBRUARY, 1973.

WHITNEY MORTY SEYMOUR, ESQUIRE
ONE BATTERY PARK PLAZA
NEW YORK, NEW YORK 10004

CAHILL GORDON, ESQUIRE AND
DENNIS MCINERNEY, ESQUIRE
80 PINE STREET
NEW YORK, NEW YORK 10005

SULLIVAN & CROMWELL, ESQUIRES
48 WALL STREET
NEW YORK, NEW YORK 10005

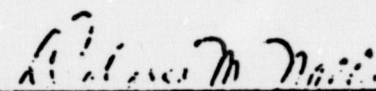

DOLORES M. KALLY
- SECRETARY TO FRED LOWENSCHUSS

EXHIBIT C - AFFIDAVIT OF FRED LOWENSCHUSS IN
SUPPORT OF PETITION

44a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GULF & WESTERN INDUSTRIES, INC. : DOCKET NO. 73-1223
 plaintiff-appellant :
 -against- :
THE GREAT ATLANTIC & PACIFIC :
TEA COMPANY, INC. :
 defendant & third : AFFIDAVIT SUR PETITION
 party plaintiff : TO INTERVENE AND/OR FILE
 appellee : A BRIEF AMICUS CURIAE
 -against- :
CHARLES G. BLUHDORN :
 third party defendant :
 appellant :
 -against- :
KIDDER, PEABODY & CO., INC. :
 third party defendant :

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF PHILADELPHIA :

SS

Fred Lowenschuss, Esquire, being duly sworn, deposes and
says:

1. I am a member of the firm of Fred Lowenschuss Associates, attorneys for petitioner, Fred Lowenschuss Associates Pension Plan. I submit this affidavit in support of the petition to intervene and in response to the affidavit filed by Denis McInerney, Esquire, allegedly on behalf of A & P.
2. Petitioner was aware of the pending action between Gulf & Western and A & P by way of the press and the Dow Jones ticker tape. From the information received, it was not contemplated that an injunction would be issued by the District Court enjoining Gulf & Western from paying for the tendered shares.

45a

It was felt that the action in the District Court was brought on behalf of Gulf & Western to insure the success of the tender offer and was opposed by the officers and directors of A & P in order to protect their employment status and perpetuate themselves in their position. It should be noted that both Gulf & Western and A & P accused each other of improprieties and illegalities pertaining to this tender offer and the opposition thereto. There is a question as to whether one or both of the companies have come into Court with "clean hands" to support their prayer for equitable relief. It is incontestable that the tendering shareholders, whose rights are being directly affected by this injunction, have clean hands and substantial equities in their favor. It is most significant that Judge Duffy's Opinion, granting preliminary injunctive relief to A & P, wherein the Court purports to balance the equities between the parties, makes no reference whatsoever to the equities and position of the tendering shareholders. It is submitted that the attorneys who allegedly represented the interests of A & P and its shareholders, were, in reality, representing the interests of the officers and directors and acting in direct contravention of the interests of the tendering shareholders. It is not surprising that the officers and directors of A & P, and its appointed law firm, all having vested interests contrary to the interests of the corporation and its shareholders, have taken such a position and would like this Court to close its doors to the one group of persons who have come into this Court with clean hands.

Judge Duffy clearly recognizes, under the holding of *Hamilton Watch Company vs. Benrus Watch Company*, 206 F.2d 738 (Second Cir., 1953), that it was his duty to "balance the hardships" between the various parties. Of course, the attorneys who purport to represent A & P and its shareholders, conveniently omitted to mention the hardships to be suffered by the tendering shareholders.

Judge Duffy did recognize that the claimed violations of the Anti-Trust Laws, as alleged by A & P against Gulf & Western, are "far from clear." Furthermore, Judge Duffy recognizes that the claims of A & P are "totally unproven", whereby the Lower Court was left with no more than "a claim and intuitive feeling that at some time in the future the claim might be proven." This certainly is not a basis for causing losses in the millions of dollars to the tendered shareholders, who have at all times acted in good faith and have a right to be paid for their tendered shares.

3. It goes without saying, that the tendering shareholders have an interest which is not being protected by counsel of record - for A & P. It is not necessary to harm the tendering shareholders in order to resolve the true issues between Gulf & Western and A & P. All that needs to be determined by this Court is: "Should Gulf and Western be permitted to pay for the shares tendered to them?" It is submitted that Gulf and Western and A & P have adequate remedies inter se which do not affect the tendering shareholders. These remedies should be invoked after a full trial between the aforementioned contestants. In the meantime, the Court may avail itself of the remedy of sterilization (allowing consummation of the tender offer with deprivation of voting rights) or other directives to Gulf and Western and Bluhdorn, pertaining to divestiture of Bohack and/or whatever remedies the Court may fashion. These are the points that petitioner would like to be allowed to develop in argument and brief, which thus far have not been touched upon by the attorneys of record because their clients' interests do not coincide with these alternatives pending the outcome of the litigation.

4. Petitioner has, at all times, set forth that he is 47a
interested in a prompt determination of this matter and that there
should be no delay. A brief outline of the position of the
tendering shareholders has been set forth herein.

5. There is an old adage among lawyers, that when you are
strong on the facts and weak on the law, that you argue the facts;
That when you are strong on the law and weak on the facts, you
argue the law; That when you are weak on the facts and the law,
there is nothing left for you to do except to attack opposing
counsel. It is submitted that Fred Lowenschuss, Esquire is
admitted to practice before the U.S. Supreme Court, the Third
Circuit Court of Appeals, and the District Courts, and has had
matters before the Judicial Panel on Multidistrict Litigation.

6. The class action claim in the Eastern District Court
of Pennsylvania includes, among other things, a claim against the
officers and directors of A & P for reimbursement to A & P of
the monies improperly expended in opposition to the tender offer
of Gulf & Western and damages for wrongful interference with a
contractual relationship between the tendering shareholders and
Gulf & Western, which interference was motivated by selfish
concerns of the officers and directors of A & P. To satisfy
A & P's further doubtfulness, Fred Lowenschuss herein reiterates,
under oath, that Fred Lowenschuss Associates Pension Plan tendered
2,000 shares on February 13, 1972, which it owned, through the
stock brokerage firm of Herzfeld and Stern.

7. Petitioner's claim for intervention did not ignore the
alleged statements herein made by the law firm allegedly repre-
senting the interest of A & P and its shareholders:

a. The tendering shareholders are most happy and
thrilled to tender their shares for a net of \$20.00 per share,
since A & P's past performance and present course shows that \$20.00
per share is fair and liberal compensation. In any event, the
shareholders still wish to receive the monies for their tendered

shares, after being enlightened by the law firm allegedly representing the interests of A & P.

b. This statement does not support any position and is not a candid statement. At best, it is thrown in to confuse the record.

c. All of the statements in writing and under oath, on behalf of Gulf & Western and its chairman, Charles Bluhdorn, have warranted that this tender offer was made for investment purposes only. Of course, on the track record of the management of A & P, they should have concern regarding the status of their employment, position or managerial roles regardless of whether or not Gulf & Western is entitled to vote its shares. The only thing that would cause a disadvantage to those stockholders of A & P that remain, would be the Court allowing present management to perpetuate itself under the guise of its vague and spurious allegations.

d. It is most evident that the tendering shareholders do not desire to have the status quo restored and are anxious to receive their monies for the tendered shares, which is greatly in excess of the quoted market value of the stock. The tendering shareholders will only have been misled and injured if Gulf and Western is not permitted to pay for the tendered shares.

8. The concern of the petitioner, on behalf of all tendering shareholders, is real, substantial and necessary in view of the selfish and self-perpetuating activities of the officers and directors of A & P in using the vast funds of A & P for their own purposes. It is the actions of the law firm allegedly representing the interests of A & P and its shareholders, while in reality representing the selfish interests of the officers and directors, which are suspect. It is further submitted that the expressions

pertaining to possible divestiture and wide percentage fluctuations in the price of A & P stock have been distorted and taken out of context. Those are some of the assertions which need to be fully developed in brief and argument.

9. It is submitted that the interest of the tendering shareholders must be protected immediately and they should not be forced into limbo pending the outcome of protracted further litigation. It is respectfully submitted that the actions and interests of the officers and directors of A & P and their appointed counsel, who allegedly represent the interests of A & P and its shareholders, be scrutinized.

FRED LOWENSCHUSS ASSOCIATES

BY: F. Lowenschuss
Attorneys for Plaintiffs

DATE: February 26, 1973

Sworn to and Subscribed :

Before me this 26th day :

Of Ill. A.D. 1973 :

Raymond L. Reed

Notary Public

My Commission Expires March 22, 1974

CERTIFICATE OF SERVICE

50a

I, Dolores M. Nally, hereby certify that copies of the Petition to Intervene and/or File a Brief Amicus Curiae were served by mail, postage prepaid, in accordance with the Federal Rules of Civil Procedure, on the 21st day of February, 1973, and copies of the annexed Affidavit Sur Petition to Intervene and/or File a Brief Amicus Curiae, were served upon the following persons by mail, postage prepaid, in accordance with the Federal Rules of Civil Procedure, on the 26th day of February, 1973

I also certify that I am over 21 years of age and I am authorized to execute this Certificate of Service.

Whitney North Seymour, Esquire
One Battery Park Plaza
New York, New York 10004

Cahill, Gordon, Sonnett, Reindel & Ohl, Esquires
80 Pine Street
New York, New York

Sullivan & Cromwell, Esquires
48 Wall Street
New York, New York

Dolores M. Nally
Dolores M. Nally
Secretary to Fred Lowenschuss

EXHIBIT D - BRIEF AMICUS CURIAE ON BEHALF OF
TENDERING SHAREHOLDERS OF A.&P.

51a

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 73-1223

GULF & WESTERN INDUSTRIES, INC.

/ Plaintiff-Appellant

-against-

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.

Defendant & Third-party
Plaintiff - Appellee

-against-

CHARLES G. BLUHDORN

Third-party Defendant
Appellant

-against-

KIDDER, PEABODY & CO., INC.

Third-party Defendant

BRIEF AMICUS CURIAE ON BEHALF OF TENDERING SHAREHOLDERS OF A & P

FRED LOWENSCHUSS ASSOCIATES
Attorneys for Fred Lowenschuss
Associates Pension Plan and
Tendering Shareholders

Suite 1822 - Two Penn Center Plaza
15th & John F. Kennedy Boulevard
Philadelphia, Pennsylvania 19102

Litigation Dept.

| |
|----------------------|
| Appeared..... |
| Filed..... |
| Served..... |
| Ser.ed..... |
| Rec.mark..... |
| Revised (on) 2/21/73 |
| Ord.ed..... |
| En red..... |
| Diary..... |
| Register. ✓ |
| Examined..... |

INDEX

| | PAGE |
|--|------|
| Table of Cases | ii |
| Statement of Questions Involved | 1 |
| History of the Case Relating To A & P Shareholders | 2 |
| Summary of Argument | 6 |
| Argument | 7 |
| Conclusion | 13 |

TABLE OF CASES

| | PAGE |
|---|-------|
| Butler Aviation International, Inc. vs. Comprehensive Designers, Inc., 425 F.2d 842 (2d Cir. 1970) | 9 |
| Chris-Craft Industries, Inc. vs. Piper Aircraft Corp. 303 F. Supp. 191, aff'd on other grounds 426 F.2d 569 (2nd cir. 1969) | 8, 12 |
| Electronic Specialty Co. vs. International Controls Corp., 409 F.2d 937 (2nd cir. 1969)..... | 8, 12 |
| Hamilton Watch Co. vs. Benrus Watch Co., 206 F.2d 738 (2nd cir. 1953) | 7 |
| Susquehanna Corp. vs. Pan American Sulphur Co., 423 F.2d 1075 (5th cir. 1970) | 12 |

HISTORY OF THE CASE
AS RELATING TO A & P SHAREHOLDERS

This Brief Amicus Curiae is filed conditionally pursuant to Federal Rule of Appellate Procedure 29, an earlier motion for leave to intervene and/or file a brief amicus having been filed with the Court on or about February 22, 1973.

This case arises out of a tender offer for 3.75 million shares of A & P stock by Gulf & Western. Said tender offer has been enjoined by the Court below, affecting serious rights of the tendering shareholders, who had not been represented, and whose position had not been made clear on the record.

Over the past several years the fortunes of the Great Atlantic & Pacific Tea Company, Inc., have been declining steadily. In its fiscal year of 1970, A & P's earnings were approximately \$53,302,000.00. In the fiscal year of 1973, on sales of approximately Six Billion Dollars, A & P incurred a substantial loss somewhere between Fifty and One Hundred Million Dollars. Also, over the past several years, prior to fiscal year 1972, the A & P share of the grocery business declined from nearly 10% to about 6%.

Furthermore, the dividends paid on A & P shares have declined from \$1.60 per share in the fiscal year 1968 to its omission as of January 4, 1973. The quoted price of A & P stock, on the New York Stock Exchange, has declined from a high of 59, reached in the year 1962, to a low of 14-3/8, reached in 1973.

purposes of merging, dominating or acquiring control of A & P. (Gulf & Western has taken large positions in many of New York Stock Exchange companies for investment purposes and has never attempted to control or merge with said companies. ., Pan American World Airways, Armour & Co., Allis-Chalmers, Clair Corporation, etc.) *

In response to the tender offer and the previous actions of Gulf & Western, the New York Stock Exchange quotation for the common stock of A & P rose from a low of 14-3/8 to a high of 17-7/8 per share.

The officers and directors of A & P, sensing that their vested interests and positions were in possible jeopardy, advised the general public and the A & P shareholders, in writing and through the mass media, that the offered price of \$20.00 per share was inadequate and the shareholders should therefore not tender their shares. Of the estimated 7.9 million shares in the hands of the general public, (the remainder of the 24,875,000 shares being in the hands of the Hartford family, various foundations and funds), the holders of 3.8 million shares have chosen to disregard the advice of the management of A & P and have tendered their shares to Gulf & Western in accordance with the terms of the tender offer.

In the meantime, the officers and directors of A & P have successfully prevailed upon the lower Court to issue a preliminary injunction preventing consummation of the tender offer, and most

Some of the information related herein was obtained from the New York Street Journal February 14, 1973 and February 15, 1973. In lengthly articles appeared pertaining to this controversy, Gulf & Western, A & P and its shareholders and directors.

important of all, preventing the tendering shareholders from receiving payment for their shares. It should be noted that, in the interim, the quoted price of the shares of A & P stock has declined to the low 16's as a consequence of the uncertainty surrounding the tender offer. Furthermore, the shareholders who have tendered their shares stand to lose \$4.00 per share or more for their tendered shares, or a total sum approximating \$15,000,000.00 or more, in the event that Gulf & Western is prohibited from paying for the tendered shares.

SUMMARY OF ARGUMENT

58a

The District Court has improperly issued a preliminary injunction on the admitted basis of a mere "intuitive feeling" about alleged Anti-Trust violations which are "far from clear". This action of the Court is clearly erroneous and the tendering shareholders of A & P should immediately be permitted to receive payment for their shares.

In balancing the resultant hardships which necessarily flow from issuance of a preliminary injunction, the District Court erred in failing to consider the interests and equities of the tendering shareholders. The lengthy Opinion of the Court below, enjoining consummation of the tender offer, does not even mention the tendering shareholders. The lower Court's hasty resort to the extraordinary remedy of injunctive relief has improperly and unnecessarily permitted incumbent management to frustrate the informed choice which has been manifested by the tendering shareholders.

The lower Court's injunction has no basis in law or fact, fails to serve any legitimately compelling public or private interest, and has improperly subjected the tendering A & P shareholders, and possibly others, to immediate and irreparable injury.

ARGUMENT

The officers and directors of A & P have obtained a preliminary injunction against the tender offer made by Gulf & Western Industries, Inc. The grounds alleged by A & P, in the lower Court request for injunctive relief, were two fold:

1. That there were misstatements and omissions of material facts made by Gulf & Western in its tender offer;
2. That there may be violations of the Anti-Trust Laws by Gulf & Western.

The lower Court, per the Honorable Kevin Thomas Duffy, found that said claims by the officers and directors of A & P were "far from clear" and "unproven". (Opinion of lower Court page 14) At best, the lower Court found that its "intuitive feeling" was that at some time in the future said claims may be proven. (Opinion of lower Court page 17) On the aforementioned mere possibility, the lower Court entered a preliminary injunction against Gulf & Western which, at best, is based on very tenuous grounds.

MOST IMPORTANTLY, THE 21 PAGE OPINION OF THE LOWER COURT FAILS TO MENTION, IN ANY RESPECT WHATSOEVER, THE POSITION AND INTEREST OF THE TENDERING SHAREHOLDERS AND THE HARDSHIPS AND LOSSES WHICH WILL BE SUFFERED BY SAID TENDERING SHAREHOLDERS AS A CONSEQUENCE OF THE COURT'S UTILIZATION OF THE INJUNCTIVE REMEDY.

The lower Court cites the case of Hamilton Watch Co. vs. Benrus Watch Co., 206 F.2d 738 (2nd cir. 1953) as authority for the proposition that it must balance the equities and hardships between the various interested parties, and conclude that the balance of hardships tips decidedly toward the party seeking an injunction,

before the party seeking extraordinary remedy may prevail. It is submitted that the balance of relative hardships in this case tilts decidedly toward the shareholders and not in the direction of A & P and/or its officers and directors. The remedy of injunctive relief against tender offerors has often been denied by the Courts, not only because of the financial loss which it causes the offeror as a result of the expenses incurred in preparing and effecting the tender offer, but also because it deprives the target company stock holders of an opportunity to decide for themselves the relative benefits of tendering their stock or instead retaining it.

Electronic Specialty Co. vs. International Controls Corp., 409 F.2d 937 (2nd cir. 1969); Chris-Craft Industries, Inc. vs. Piper Aircraft, 303 F. Supp. 191, aff'd on other grounds, 426 F.2d 569 (2nd cir. 1969)

The present dilemma of the A & P shareholders has recently been well articulated by a spokesman for the Josephine H. McIntosh Foundation and the Estate of Josephine McIntosh, which decided to tender 250,000 of its approximately 1.8 million shares. In the words of the Foundation's president, Michael McIntosh, in response to an inquiry by the Wall Street Journal:

"We feel abandoned by A & P's management, by the Hartford Foundation, and by the Court...."

As reported in the "Journal", "Mr. McIntosh said the McIntosh Foundation has told A & P management that it considers A & P's action of preventing any holders from tendering their shares 'unreasonable'. (Wall Street Journal - Thursday, February 15, 1973 page 4, column 2)

The attitude of those shareholders who have tendered a portion of their stock, choosing to retain considerable holdings, is most indicative of the weakness of the argument advanced by A & P that Gulf & Western can only bring harm to the company. These shareholders, such as the McIntosh Foundation, have apparently received what they feel is good value for their tendered shares in view of the company's present condition, but are most certainly of the opinion that Gulf & Western's interest in A & P may, at some future date, cause the company's fortunes to turn around, thereby appreciating the value of their retained holdings.

In weighing a request for preliminary injunctive relief against a tender offeror, the District Court should thoroughly explore the interests of the target company's shareholders, and recognize that it must guard against the risk that incumbent management may be using the Court as a tool to frustrate informed stockholders from doing that which they desire. Butler Aviation International, Inc. vs. Comprehensive Designers, Inc., 425 F.2d 842 (2nd cir. 1970) If misleading and/or improper statements were made by Gulf & Western and/or Charles G. Bluhdorn, its Chairman, in connection with the tender offer, the shareholders have their remedy at law for damages. Furthermore, in the interim, said shareholders can withdraw their tendered shares. This Court can set up further ground rules for protection of the shareholders of A & P if that be deemed necessary. The Court may require further clarifying statements to be made by Gulf & Western plus additional time after the completion of the tender offer wherein the shareholders who tendered may request and receive back their tendered shares, or fashion some other appropriate remedy which would not frustrate

and punish those tendering shareholders who elect to stand by their decision.

The claim of alleged Anti-Trust violations is nothing more than mere conjecture. It is submitted that any and all large corporations and businesses may, conceivably, incur the risk of violating the Anti-Trust Laws at some distant time in the future. But, such speculation is hardly a rational basis for enjoining present actions which have not even been found likely to be illegal or violative of the Anti-Trust Laws. Furthermore, Gulf & Western and its officers and directors are now on notice that their actions are being meticulously scrutinized, and this certainly provides a meaningful deterrent to any conceivable future improper actions.

It is most difficult to fathom how the ownership of 19% of A & P's common stock, by Gulf & Western, would be detrimental per se to A & P and/or its remaining stockholders. The fact that Gulf & Western purposely kept its tender offer below 20% of the outstanding shares of A & P, shows that Gulf & Western does not wish to consolidate any part of A & P's losses (estimated at between Fifty to One Hundred Million Dollars) into Gulf & Western's profit and loss statement, and/or otherwise affect a merger or consolidation. The mere fact that Gulf & Western may, at some future date, attempt to utilize this shareholding position for purposes other than "investment", may be appropriately dealt with by A & P, objecting shareholders, or other interested parties at such time, if ever, that these problems materialize. In the meantime, continuing the injunction will cause undue hardship and heavy financial losses to be suffered by the tendering shareholders and

the remaining shareholders of A & P and Gulf & Western.

It is important to analyze the position of the A & P shareholders in relation to the value of their company if Gulf & Western is prevented from consummating the tender offer. Presently, A & P is suffering staggering losses, has suspended payment of dividends, and is heading in a Kamikaze course. The only possible way of turning around the fortunes of A & P is by drastically cutting the overhead, realigning management, and/or raising prices. Otherwise, if A & P continues its present course, it can only end up in reorganization and/or bankruptcy. Under the present management and shareholding set up, there is very little likelihood of A & P returning to its earlier position of prominence in the industry.

On the other hand, if the tender offer is permitted to be consummated, Gulf & Western and its management team have a proven track record of rehabilitating floundering companies by timely advice and other aid. Gulf & Western will have approximately One Hundred Million Dollars or so invested in A & P, and it certainly would be interested in seeing that the fortunes of said company are advanced rather than hindered. Moreover, the mere fact that Gulf & Western takes a position in a company is an infusion to the general public's confidence, thereby increasing the quoted price of the stock. Suffice it to say that the remaining shareholders of A & P would not be adversely affected by the fact that Gulf and Western owns 19% of the outstanding shares of A & P.

Even assuming, arguendo, that A & P's Anti-Trust allegations pose questions wherein further testimony must be taken and/or the case further developed, it is submitted that payment for the tendered shares be permitted and the interim remedy of "sterilization" be applied by denying Gulf & Western the right to vote said shares until such time as a final adjudication is reached.

If, at any time, in the distant future, a determination is made that Gulf & Western is acting improperly and in violation of the Anti-Trust Laws, a divestiture order can readily be entered which will rectify the situation. There is no need to, at this time, anticipate any wrongdoing which possibly may occur at some distant date. There is more than ample precedent for the foregoing adaptation of remedies as outlined in the cases cited in the lower Court's Opinion. Electronic Specialty Co. vs. International Controls Corp., cited supra, plus Chris-Craft Industries, Inc. vs. Piper Aircraft Corp., cited supra, and Susquehanna Corp. vs. Pan American Sulphur Co., 423 F.2d 1075 (2 Cir. 1970)

CONCLUSION

While this Court has recognized, in Electronic Specialty, cited supra, that "prompt and judicious" handling of applications for temporary injunctions is both desirable and necessary in cases arising from tender offers, it is submitted that the lower Court's complete disregard of the interests of the tendering A & P shareholders can by no means be viewed as "judicious". It is submitted that the general public and the shareholders of A & P are in no way benefited by this preliminary injunction, the sole benefactors being officers and directors of A & P who are directly responsible for the present plight of said company.

It is respectfully requested that petitioner be allowed to further develop the position of the tendering shareholders by way of oral argument and to respond to the brief which will be filed by the attorneys for A & P.

FRED LOWENSCHUSS ASSOCIATES

BY: Fred Lowenschuss
Attorneys for Petitioners

KIDDER PEABODY & CO. NOTICE OF MOTION TO DISMISS
UNITED STATES DISTRICT COURT (Filed June 22, 1973)

66a

SOUTHERN DISTRICT OF NEW YORK

----- x
FRED LOWENSCHUSS, :
 :
Plaintiff, : 73 Civ. 2021 - KTD
-against- : NOTICE OF MOTION
W. J. KANE, et al., :
 :
Defendants.:
----- x

S I R S :

PLEASE TAKE NOTICE, that upon the pleadings and all papers and prior proceedings herein, defendant Kidder, Peabody & Co. Incorporated will move this Court at Room 1604, United States Court House, Foley Square, New York, New York, on the 3rd day of July, 1973 at 2:15 o'clock in the afternoon or as soon thereafter as counsel can be heard for an order pursuant to F.R. Civ. P. 12(b)(6) dismissing the complaint herein on the ground that the complaint fails to state a claim upon which relief can be granted, and for such other and further relief as may be just and proper.

Dated: New York, New York
June , 1973

Yours, etc.,

SULLIVAN & CROMWELL

By WILLIAM E. WILLIS
(A Member of the Firm)

Attorneys for defendant
Kidder, Peabody & Co. Incorporated
48 Wall Street
New York, New York 10005
Tel.: (212) HANover 2-8100

TO: CAHILL, GORDON & REINDEL
Attorneys for defendants
The Great Atlantic & Pacific
Tea Company, Inc., W.J. Kane, et al.
80 Pine Street
New York, New York 10005

SIMPSON, THACHER & BARTLETT
Attorneys for defendants
Gulf & Western Industries, Inc.
and Charles G. Bluhdorn
One Battery Park Plaza
New York, New York 10004

ABRAHAM E. FREEDMAN
Attorney for plaintiff
36 Seventh Avenue
New York, New York 10011

NOTICE OF MOTION TO DISMISS OF A&P AND OFFICERS AND
 UNITED STATES DISTRICT COURT DIRECTORS OF A&P
 SOUTHERN DISTRICT OF NEW YORK (Dated June 21, 1973)

----- x
 FRED LOWENSCHUSS, Trustee for Fred :
 Lowenschuss Associates Pension :
 Plan, Individually and on behalf of :
 all other persons and shareholders :
 of Great Atlantic & Pacific Tea :
 Co., Inc. who are similarly :
 situated, :

Plaintiffs, :

Civil Action No.
 73 Civ. 2021
 (KTD)

vs. :

NOTICE OF MOTION

W. J. KANE, H. J. BEPRY, :
 R. M. BROWN, JR., W. CORBUS, :
 D. K. DAVID, H. C. GILLESPIE, :
 J. S. KROH, E. A. LE PAGE, :
 R. F. LONGACRE, M. D. POTTS, :
 J. M. SCHIFF, P. A. SMITH, :
 H. TAYLOR, JR., E. J. TONER, :
 W. I. WALSH, N. F. WHITTAKER, :
 J. A. ZEIGLER (all of whom are :
 officers and directors of :
 Great Atlantic & Pacific Tea :
 Co., Inc.) and GREAT ATLANTIC & :
 PACIFIC TEA CO., INC. and C. G. :
 BLUHDORN and GULF & WESTERN :
 INDUSTRIES, INC. and KIDDER, :
 PEABODY & CO., :

Defendants. :

----- x
 S I R S:

PLEASE TAKE NOTICE that pursuant to Rules 9(b), 11,
 12(b)(1) and (6) and 12(c) of the Federal Rules of Civil Pro-
 cedure the undersigned will move this Court for an order dis-
 missing the complaint herein or for judgment upon the plead-
 ings before the Honorable Kevin T. Duffy in Courtroom 128,
 United States Courthouse, Foley Square, New York, New York,

on the 3rd day of July, 1973, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

PLEASE TAKE FURTHER NOTICE that the aforesaid defendants make this motion in order to expedite disposition of this case and it should not be deemed a waiver by defendants of the issues of lack of personal jurisdiction and service raised by defendants in its motion to dismiss filed on March 16, 1973.

June 21, 1973.

OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
Attorneys for Defendants,
Officers and Directors of
Great Atlantic & Pacific
Tea Co., Inc.
299 Park Avenue
New York, New York 10017
(212) 688-0400

By *Ryan M. [Signature]*
A Member of the Firm

TO:

MESSRS. SIMPSON, THACHER & BARTLETT
Attorneys for Defendants,
C. G. Bluhdorn and Gulf &
Western Industries, Inc.
One Battery Park Plaza
New York, New York 10004

MESSRS. CAHILL, GORDON & REINDEL
Attorneys for Defendant,
Great Atlantic & Pacific Tea Co., Inc.
80 Pine Street
New York, New York 10005

MESSRS. SULLIVAN & CROMWELL
Attorneys for Defendant,
Kidder, Peabody & Co.
48 Wall Street
New York, New York 10005

FRED LOWENSCHUSS ASSOCIATES
Attorneys for Plaintiff
1822 Two Penn Center Plaza
Philadelphia, Pennsylvania 19102

PLAINTIFF'S NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT
(Filed June 29, 1973)

70a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
FRED LOWENSCHUSS, Trustee for Fred :
Lowenschuss Associates Pension :
Plan, Individually and on behalf of :
all other persons and shareholders :
of Great Atlantic & Pacific Tea :
Co., Inc. who are similarly :
situated, :

Plaintiff, :

vs. :

73 Civil 2021 (KTD)

W.J. KANE, H.J. BERRY, R.M. BROWN, :
JR., W. CORBUS, D.K. DAVID, H.C. :
GILLESPIE, J.S. KROH, E.A. LE PAGE, :
R.F. LONGACRE, M.D. POTTS, J.M. :
SCHIFF, P.A. SMITH, H. TAYLOR, JR., :
E.J. TONER, W.I. WALSH, N.F. :
WHITTAKER, J.A. ZEIGLER (all of whom :
are officers and directors of Great :
Atlantic & Pacific Tea Co., Inc.) :
and GREAT ATLANTIC & PACIFIC TEA CO., :
INC. and C.G. BLUHDORN and GULF & :
WESTERN INDUSTRIES, INC. and KIDDER, :
PEABODY & CO., :

Defendants. :

NOTICE OF CROSS-MOTION
FOR SUMMARY JUDGMENT

-----X
S I R S:

PLEASE TAKE NOTICE that, upon the annexed affidavit of
Fred Lowenschuss, Esq., sworn to the 20th day of June, 1973,
the decision and order of this Court and the United States Court
of Appeals for the Second Circuit in Gulf & Western Industries,
Inc. vs. Great Atlantic & Pacific Tea Co., Inc. vs. Charles G.
Bluhdorn and Kidder, Peabody Inc., 73 Civil 536, affirmed, Second
Circuit, Court of Appeals, docket no. 73-1223, and all the prior
pleadings and proceedings heretofore filed or had herein,
plaintiffs will move the Court, by cross-motion before the

Honorable Kevin T. Duffy in Courtroom 128 in the United States
Courthouse, Foley Square, New York, New York on the 3rd day
of July, 1973 at 9:30 o'clock in the forenoon of that day,
or as soon thereafter as counsel may be heard, for an order
pursuant to Rule 56 of the Federal Rules of Civil Procedure
granting summary judgment to plaintiffs on the issue of
liability against defendants Charles G. Bluhdorn and Gulf &
Western Industries, Inc., and for such other and further relief
as to the Court may seem just and proper for the circumstances.

Dated: New York, New York
June 28, 1973

Yours, etc.,

ABRAHAM E. FREEDMAN and
FRED LOWENSCHUSS ASSOCIATES

by *Charles G. Bluhdorn*
26 Seventh Avenue
New York, New York 10011
Attorneys for Plaintiff

TO:

MESSRS. SIMPSON, THACHER & BARTLETT
Attorneys for Defendants, C.G.

Bluhdorn and Gulf & Western Industries, Inc.
One Battery Park Plaza
New York, New York 10004

MESSRS. SULLIVAN & CROMWELL

Attorneys for Defendant,

Kidder, Peabody & Co.

48 Wall Street

New York, New York 10005

MESSRS. CAHILL, GORDON & REINDEL

Attorneys for Defendant,

Great Atlantic & Pacific Tea Co., Inc.

80 Pine Street

New York, New York 10005

MESSRS. OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER

Attorneys for Defendants, Officers

and Directors of Great Atlantic & Pacific Tea Co., Inc.

299 Park Avenue

New York, New York 10017

AFFIDAVIT OF FRED LOWENSCHUSS IN SUPPORT OF CROSS-MOTION

72a

THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

----- x
FRED LOWENSCHUSS, Trustee for Fred :
Lowenschuss Associates Pension Plan, :
Individually and on behalf of all :
other persons and shareholders of :
Great Atlantic and Pacific Tea Co., :
Inc. who are similarly situated, :

CIVIL ACTION NO.
73 Civ. 2021
(KTD)

Plaintiffs :

vs. :

W. J. KANE, H. J. BERRY, :
R. M. BROWN, JR., W. CORBUS :
D. K. DAVID, H. C. GILLESPIE, :
J. S. KROH, E. A. LePAGE, :
R. F. LONGACRE, M. D. POTTS, :
J. M. SCHIFF, P. A. SMITH, :
H. TAYLOR, JR., E. J. TONER, :
W. I. WALSH, N. F. WHITTAKER, :
J. A. ZEIGLER (all of whom are :
officers and directors of Great :
Atlantic & Pacific Tea Co., Inc. and :
C. G. BLUHDORN and GULF & WESTERN :
INDUSTRIES, INC. and KIDDER, :
DEAROV & CO. :

AFFIDAVIT

Defendants :

----- x
COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF PHILADELPHIA : SS

FRED LOWENSCHUSS, being duly sworn, deposes and says:

1. I am a member of the firm of Fred Lowenschuss Associates, Attorneys of record for Fred Lowenschuss, Trustee for Fred Lowenschuss Associates Pension Plan, individually and on behalf of all other persons and shareholders of Great Atlantic & Pacific Tea Co., Inc., who are similarly situated and I am also the Trustee for the Pension Plan and I am fully familiar with all of the facts hereinafter set forth.

738

2. This affidavit is submitted in support of the motion of plaintiffs for summary judgment against the defendants Gulf & Western Industries, Inc. and Charles G. Bluhdorn, and in opposition to the motion of defendants Bluhdorn and Gulf & Western Industries Inc. for dismissal of the complaint.

FACTUAL BACKGROUND

3. From January 9, 1973, to January 16, 1973, the quoted price on the New York Stock Exchange of A & P stock fluctuated from a low of 14-3/8 to a high of 15-7/8 as reported in the Wall Street Journal and researched by the firm of Herzfeld & Stern.

4. Immediately prior to the tender offer of Gulf & Western being announced to the general public, the stock of A & P rose sharply and on February 1, 1973, the date that Gulf & Western first publicly announced its intention to make a tender offer, 97,900 shares were traded on the New York Stock Exchange as reported in the Wall Street Journal, with the stock reaching a high of 19 and a low of 18-1/4 on that day.

5. On February 2, 1973, in reliance on and response to the tender offer made by Gulf & Western, as it appeared in the Wall Street Journal on said date, Fred Lowenschuss, as Trustee for the Fred Lowenschuss Associates Pension Plan, placed orders to purchase 2,000 shares of A & P stock with the brokerage firm of Herzfeld & Stern, intending to accept the open offer of unilateral contract made by Gulf & Western.

6. On said February 2, 1973, said order was executed and 600 shares were purchased at 18-5/8 and at a net amount including commissions of \$11,291.88 and 1400 shares were purchased at 18-3/8 at a net amount of \$25,997.72.

7. Said shares were properly tendered in accordance with the instructions of Gulf & Western, by Herzfeld & Stern, to

the depository designated by Gulf & Western which was Manufacturers Hanover Trust Co.

8. It was understood, by way of public disseminations made by Gulf & Western, that a total of 3.8 Million shares were properly tendered in accordance with the instructions of the Gulf & Western tender offer. These tenders "constituted full acceptance" of Gulf & Western's unilateral offer.

9. That based on the information made available in the tender offer as well as the general information available to the general public and, in particular, to Fred Lowenschuss Trustee, Lowenschuss and the other tendering shareholders were not aware of any illegality, impropriety or violations of the "Williams Act" and/or the "Anti-Trust Laws" by Gulf & Western, Charles G. Bluhdorn, and/or Kidder, Peabody & Co., Inc.

10. It was believed that Gulf & Western had made a legal tender offer in the form of a unilateral contract which was consummated upon proper tender of shares to the depository in accordance with the terms of the tender offer, and that Gulf & Western would then be responsible for payment for said tendered shares accordingly.

11. The essence of the instant complaint, in the present posture, is for the tendering shareholders to receive \$20.00 per share for the tendered 3.75 Million shares, or in the alternative, damages from the defendants herein, occasioned by the breach of contract caused by the illegal and improper actions of defendants Gulf & Western, Bluhdorn and/or Kidder, Peabody & Co., Inc.

12. That defendants, Gulf & Western, Bluhdorn, and/or Kidder, Peabody & Co., Inc. have caused wide fluctuations in the market evaluation of A & P shares of stock by Gulf & Western's

purchase of over one million shares on the open market prior to making the tender offer and by dissemination of a tender offer which Lowenschuss and the general public believed to be valid, legal, proper and binding, and which this Court and the Second Circuit Court of Appeals have enjoined after the officers and directors of A & P delved into the actions of Gulf & Western and its Chairman, Bluhdorn, and the facts surrounding the tender offer, and the business operations and holdings of Gulf & Western and Bluhdorn, at which time a preliminary decision was made by this Court that serious questions of illegality and violations of the "Williams Act" and the "Anti-Trust" laws were posed, which were likely to succeed at a future trial.

REASONS FOR ENTERING SUMMARY JUDGMENT

13. There are no facts in dispute in this litigation pertaining to the tender offer and the acceptance by the tendering shareholders by tendering in accordance with said offer.

- A. If the tender offer as made was in any way illegal or improper, it was caused solely by the actions of defendants, Gulf & Western, and/or Charles G. Bluhdorn and/or Kidder, Peabody & Co., Inc.;
- B. The tendering shareholders in no way contributed to any of the circumstances which could possibly have made the original tender offer by defendants herein illegal and/or improper;
- C. The instant suit sought damages for the tendering plaintiff class in the event that Gulf & Western refused to consummate the tender offer and/or if any determination was made that Gulf & Western may not accept the tendered shares;

- D. That plaintiff herein and members of the class were not aware and/or apprised of the facts and/or circumstances which subsequently led to the injunction of the tender offer;
- E. That defendants herein have refused to take any steps whatsoever to rectify and/or legalize their tender offer;
- F. That defendants herein could conceivably divest themselves of the holdings which create the aura of violations of anti-trust laws and/or correct their Williams Act violations;
- G. That defendants continually extended the tender offer, the most recent extension being to August 17, 1973, whereby defendants have falsely indicated to the general public and tendering shareholders that there is a possibility of said tender going through and that Gulf & Western would be paying for the tendered shares;
- H. That the actions of the defendants herein have been made solely to defeat the claims of the tendering shareholders and have aggravated and exacerbated any damages which the tendering have suffered and/or shareholders/will suffer since, during the extensions of the tender offer, the quoted price of A & P shares of stock has steadily declined and reached a low of 9-3/4.

14. That the actions of defendants herein have caused plaintiff and plaintiff's class not only to lose the benefits of

their bargain of the unilateral contract which they accepted, but also have greatly magnified the losses of said tendering shareholders in requiring them to hold the shares tendered until a determination is made by Gulf & Western and/or the Courts pertaining to the resolution of these matters.

15. In the period between February 1, 1973 and February 13, 1973, the inclusive dates under the tender offer, 583,700 shares of A & P stock were purchased on the New York Stock Exchange as reported in the Wall Street Journal and researched by the brokerage firm of Herzfeld & Stern.

16. That defendants herein specifically sought members of the general public to purchase shares of A & P stock and tender same to Gulf & Western and, for the inducement, offered to pay a premium above the quoted market price for said A & P shares of stock.

17. That plaintiff herein and members of the general public responded to the tender offer made by defendants herein, and in reliance on same, by the following daily purchases:

| <u>DATE</u> | <u>VOLUME</u> | <u>HIGH</u> | <u>LOW</u> |
|-------------|----------------|-------------|------------|
| 2/1/73 | 97,900 shares | 19 | 18-1/4 |
| 2/2/73 | 67,600 shares | 18-3/4 | 18-3/8 |
| 2/5/73 | 118,900 shares | 19 | 18-3/8 |
| 2/6/73 | 28,100 shares | 18-3/4 | 18-5/8 |
| 2/7/73 | 37,700 shares | 18-7/8 | 18-5/8 |
| 2/8/73 | 25,300 shares | 18-1/2 | 18-3/8 |
| 2/9/73 | 29,200 shares | 18-5/8 | 18-1/2 |
| 2/12/73 | 133,200 shares | 18-3/8 | 17-3/4 |
| 2/13/73 | 45,800 shares | 18-1/2 | 18 |

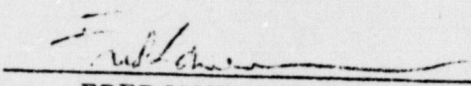
18. Following the enjoining of the consummation of the tender offer, the value of A & P stock dropped substantially, to a point below the price that said investors had paid for same in reliance upon Gulf & Western's tender offer. During the interim said shares reached a low of 9-3/4.

WHEREFORE, for the foregoing reasons, summary judgment should be entered on behalf of plaintiff's class and plaintiff and against defendants Charles G. Bluhdorn and Gulf & Western Industries, Inc.

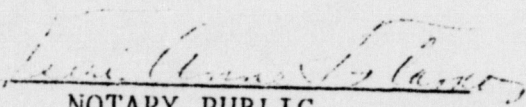
Respectfully submitted,

FRED LOWENSCHUSS ASSOCIATES

BY:


FRED LOWENSCHUSS, ESQUIRE

Sworn to and subscribed
before me this 20th day
of June, 1973.


NOTARY PUBLIC

TERI ANNE FLAMOS, Notary Public
Upper Darby, Delaware Co., Pa.
My Commission Expires April 4, 1977

Statement of Material Facts As
To Which There Is No Genuine Issue
To Be Tried Pursuant to Rule 9(g)
of the General Rules of the
Southern District of New York.

1. On February 1, 1973 Gulf & Western Industries Inc. (hereinafter "G&W") announced its intention to make a cash tender offer for the acquisition at \$20 per share of 3,750,0000 shares of stock of The Great Atlantic & Pacific Tea Co. Inc. (hereafter "A&P").
2. On February 2, 1973 the cash tender offer referred to in paragraph 1 was communicated to the public.
3. The cash tender offer communicated to the public provided that it would expire on February 13, 1973.
4. G&W stated in the tender offer that it was seeking to acquire the A&P stock for purposes of investment.
5. On February 2, 1973, the management of A&P issued a press release vigorously opposing the tender offer.
6. On February 5, 1973, G&W instituted suit in the United States District Court for the Southern District of New York against A&P alleging violations of the Securities Exchange Act of 1934 in connection with the press release referred to in paragraph 5 hereof. A&P counterclaimed against G&W and cross claimed against Charles G. Bluhdorn and Kidder, Peabody & Co, Inc. alleging that the tender offer, if consummated, would be in violation of the anti-trust laws, and that G&W had violated provisions of the Securities Exchange Act of 1934 in the tender offer. In this litigation the Court found in favor of A&P and

against G&W and Bluhdorn and dismissed as to Kidder, Peabody & Co., Inc. This decision was affirmed on appeal. See 73 Civil 536, affirmed, Second Circuit, Court of Appeals, docket no. 73-1223.

7. More than 3,750,000 shares of A&P stock were tendered in response to the tender offer prior to the expiration date.

8. Included in the shares of A&P stock properly tendered in response to the tender offer were 2,000 shares of A&P stock owned by the plaintiff herein.

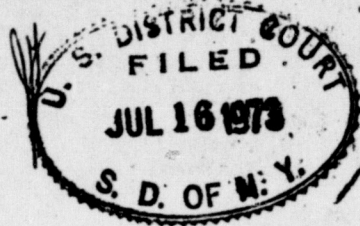
9. G&W has extended the tender offer three times, the latest extension being to August 17, 1973.

10. As of the date hereof the tender offer has not been withdrawn and no payment has been made for any of the 3,750,000 shares tendered.

STIPULATION AND ORDER DISCONTINUING ACTION AS TO
CERTAIN DEFENDANTS (Filed July 16, 1973)

81a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



FRED LOWENSCHUSS, Trustee for
Fred Lowenschuss Associates
Pension Plan, Individually and
on behalf of all other persons
and shareholders of Great
Atlantic & Pacific Tea Co., Inc.
who are similarly situated,

Plaintiff,

vs.

73 Civ. 2021 (KTD)

STIPULATION

W.J. KANE, H.J. BERRY, R.M. BROWN,
JR., W. CORBUS, D.K. DAVID, H.C.
GILLESPIE, J.S. KROH, E.A. LE PAGE,
R.F. LONGACRE, M.D. POTTS, J.M.
SCHIFF, P.A. SMITH, H. TAYLOR, JR.,
E.J. TONER, W.I. WALSH, N.F.
WHITTAKER, J.A. ZEIGLER (all of
whom are officers and directors
of Great Atlantic & Pacific Tea
Co., Inc.) and GREAT ATLANTIC &
PACIFIC TEA CO., INC. and C.G.
BLUHDORN and GULF & WESTERN
INDUSTRIES, INC. and KIDDER,
PEABODY & CO.,

Defendants.

IT IS HEREBY STIPULATED by and between the undersigned,
subject to approval by the Court, that this action may be
discontinued against defendants W.J. KANE, H.J. BERRY, R.M. BROWN,
JR., W. CORBUS, D.K. DAVID, H.C. GILLESPIE, J.S. KROH, E.A. LE PAGE,
R.F. LONGACRE, M.D. POTTS, J.M. SCHIFF, P.A. SMITH, H. TAYLOR, JR.,
E.J. TONER, W.I. WALSH, N.F. WHITTAKER, J.A. ZEIGLER, all of whom
are officers and directors of Great Atlantic & Pacific Tea Co.,
Inc., and GREAT ATLANTIC & PACIFIC TEA CO., INC. without prejudice
and without costs as against each other.

Dated: New York, New York
June 28, 1973

ABRAHAM E. FREEDMAN and
FRED LOWENSCHUSS ASSOCIATES

by Charles L. Freedman
Attorneys for Plaintiff

SMISSED
7/16/73

OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER

by Charles M. Waygood
Attorneys for Defendants,
Officers and Directors of
Great Atlantic & Pacific
Tea Co., Inc.

CAHILL, GORDON & REINDEL

by Raymond L. Felt
Attorneys for Defendant,
Great Atlantic & Pacific
Tea Co., Inc.

SO ORDERED:

John Thomas
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan, :
Individually and on behalf of all other :
persons and shareholders of Great :
Atlantic & Pacific Tea Co., Inc. who :
are similarly situated, :

Plaintiff, :

-against- :

W. J. KANE, H. J. BERRY, R. M. BROWN, JR., :
W. CORBUS, D. K. DAVID, H. C. GILLESPIE, :
J. S. KROH, E. A. LE PAGE, R. F. LONGACRE, :
M. D. POTTS, J. M. SCHIFF, P. A. SMITH, :
H. TAYLOR, JR., E. J. TONER, W. I. WALSH, :
N. F. WHITTAKER, J. A. ZEIGLER (all of whom :
are officers and directors of Great Atlantic :
& Pacific Tea Co., Inc.) and GREAT ATLANTIC :
& PACIFIC TEA CO., INC. and C. G. BLUMDORN :
and GULF & WESTERN INDUSTRIES, INC. and :
KIDDER, PEABODY & CO., :

Defendants. :

OPINION

73 Civ. 2021

-----X
APPEARANCES:

FRED LOWENSCHUSS ASSOCIATES
By Fred Lowenschuss, Esq.
Of Counsel

ABRAHAM E. FREEDMAN, ESQ.,
By Charles Sovel, Esq.
Of Counsel

Attorneys for Plaintiff

APPEARANCES continued

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER, ESQS.
Attorneys for Defendants W. J. Kane,
H. J. Berry, R. M. Brown, Jr.,
W. Corbus, D. K. David, H. C. Gillespie,
J. S. Kroh, E. A. LePage, R. F. Longacre,
M. D. Potts, J. M. Schiff, P. A. Smith,
H. Taylor, Jr., E. J. Toner, W. I. Walsh,
N. F. Whittaker, J. A. Zeigler.

By William F. Sondericker, Esq.
Joseph M. Burke, Esq.
Of Counsel

CAHILL GORDON & REINDEL, ESQS.
Attorneys for The Great Atlantic & Pacific
Tea Company, Inc.

By Raymond L. Falls, Jr., Esq.
Allen S. Joslyn, Esq.
Miles M. Tepper, Esq.
Of Counsel

SIMPSON THACHER & BARTLETT, ESQS.
Attorneys for Gulf & Western Industries, Inc.
and C. G. Bluhdorn

By John A. Guzzetta, Esq.
Of Counsel

SULLIVAN & CROMWELL, ESQS.
Attorneys for Kidder, Peabody & Co., Incorporated

By William E. Willis, Esq.
Mark I. Fishman, Esq.
Of counsel

KEVIN THOMAS DUFFY, D. J.

All parties have moved for summary judgment in this matter, which was transferred here from the Eastern District of Pennsylvania. The genesis of this action is found in the tender offer of Gulf & Western Industries, Inc. (hereinafter "G & W"), for a portion of the stock of the Great Atlantic & Pacific Tea Co., Inc. (hereinafter "A & P"). That tender offer was never consummated because of an order of this Court. See Gulf & Western Indus., Inc. v. ^{Great}Atlantic & Pacific Tea Co., Inc., 356 F. Supp. 1066, aff'd, 476 F. 2d 687 (2nd Cir. 1973).

The defendants fall into three classes: (1) the officers and directors of A & P and A & P itself; (2) the chief executive officer of G & W and G & W itself; and (3) Kidder, Peabody & Co., (hereinafter "Kidder, Peabody"), the managing agent-broker-dealer of the tender offer.

The plaintiff is a lawyer who has created a pension fund for himself and his associates. He is suing in his capacity as trustee of that pension fund.

The tender offer by G & W for the A & P shares was approved by the Board of Directors of G & W and announced on February 1, 1973, with full publicity of the offer circulated on the following day, February 2, 1973. The offer

provided for the purchase of 3.75 million shares of A & P stock if tendered on or before February 13, 1973, at a price of \$20 per share. Needless to say, as of February 2, 1973, the price of A & P stock was below the tender offer price.

On February 2, 1973, two things happened:

- (1) the management of A & P announced its opposition to the tender offer and indicated that it would take legal action to prevent the consummation of the tender offer; and
- (2) the plaintiff placed an order for 2000 shares of A & P stock, which order was executed in two transactions on the New York Stock Exchange. I make no finding as to which of these events took place first.^{1/} Thereafter, but before February 13, 1973, plaintiff tendered the A & P shares in accordance with the G & W tender offer.

On February 5, 1973, G & W filed a complaint charging A & P with violation of the Williams Act, §14, of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78(n) because of alleged misrepresentations in its release opposing the tender offer. On the same day, A & P counterclaimed against G & W and Kidder, Peabody, the managing agent of the tender offer, claiming violations of the Williams Act (supra) and also violations of the antitrust laws.

A hearing was held on February 9, 1973, and on February 13, 1973, I filed an opinion and an order prohibiting G & W from the consummation of the tender offer. The defendant Kidder, Peabody was not enjoined as I found that it had acted merely as a "broker-dealer" and no showing had been made that it violated the law. An appeal was immediately taken from my order.

On February 15, 1973, the plaintiff filed this law suit in the Eastern District of Pennsylvania. At no time did the plaintiff or any member of the class which he asserts he represents attempt to intervene in the action before me, although it is clear that he and many others of the class were aware of the litigation. The plaintiff and others representing the alleged class were, however, permitted to intervene in the appeal from my decision and they fully set forth their claims and views there.

The present action sounds in contract. The complaint alleges that the G & W tender offer was an offer of a unilateral contract; that the offer was accepted by the plaintiff and members of the class by tendering A & P shares equal to or greater than the number of shares specified in the tender offer; that the contract was completed by the tender; that A & P, its officers and directors interfered with the contractual rights of the plaintiffs; and that defendants are obligated to pay to plaintiff and the other

members of the class the tender offer price for their shares or, in the alternative, damages.

Plaintiff has stipulated to dismiss his complaint as against A & P and its officers and directors. Thus the only defendants left are G & W, Bluhdorn and Kidder, Peabody.

It should be emphasized that this case sounds only in contract. The plaintiff has filed a separate suit against the same defendants for alleged violation of the securities laws and particularly the Williams Act, supra. Although the plaintiff in his brief switches from claims sounding in contract to those in securities law, without compunction, it is clear to me that the question before the Court on this motion is one solely of contract law.^{2/} I would suspect that the other action brought by plaintiff which involves allegations of violations of the securities laws will eventually be the subject of a similar motion, but I must defer any decision as to that issue until the question is properly before the Court.^{3/}

Before turning to the motions for summary judgment, it appears to me that a threshold question is presented, namely, whether the plaintiff may maintain this action as a "class action". I hold that this is a proper class action

under Rule 23 of the Federal Rules of Civil Procedure. See e.g. Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970). Here there is clearly common questions of law affecting all the members of the class of tendering stockholders; the class is so numerous that joinder of all the tendering stockholders is impractical yet the size and identification of the class is manageable; the claims of the plaintiff are typical of that of the class; and it appears to me that the plaintiff will fairly and adequately represent the interests of the class of tendering stockholders. Finally, the efficacy of a class action in this case is obvious. This is an action where a large number of tendering A & P shareholders may have been injured, but it is unlikely that the individual injuries would rise to a level sufficient to warrant individual suits. A class action provides a method for obtaining redress for these claims.

I must now consider the merits of the various motions. Kidder, Peabody has moved for summary judgment. I am constrained to consider this as a motion to dismiss the complaint under Rule 12b of the Federal Rules of Civil Procedure. As I have said, this complaint sounds solely in contract. The plaintiff admits that:

"[i]t is, of course, clear that Kidder, Peabody's role in the making of the tender offer was that of 'dealer-manager' and, as such, it was not a party to the contractual relationship between G & W and the tendering shareholders of A & P stock."

No claim is made in the complaint that Kidder, Peabody interfered with the contractual rights of G & W and the plaintiff or the class which he represents. Accordingly, this complaint as against Kidder, Peabody must be dismissed.

The plaintiff's argument against this dismissal is founded in an argument that Kidder, Peabody "aided and abetted" G & W in violating the securities laws. That question must abide a determination on the plaintiff's other complaint where allegations of such violations are set out. In any event, there is no showing on the record before me that Kidder, Peabody knowingly and wilfully aided and abetted any violation of the Williams Act or of any other statute. In acting as dealer-manager of the tender offer, it is true that Kidder, Peabody transmitted the offer to others. But there is not the slightest scintilla of proof, much less a clear allegation, that Kidder, Peabody even knew or had reason to know, of any infraction.

Plaintiff has moved for summary judgment against G & W and Bluhdorn. It is plaintiff's argument that a tender offer is a unilateral contract conditioned only on the fact that sufficient shares be tendered as required by the offer.^{4/} The relief sought is "payment for the shares of A & P stock that were tendered to G & W, or, in the event that a determination is made that G & W may not accept the tendered shares that damages be awarded to plaintiff and the members of the class for the losses they have suffered by reason of the failure to complete the tender offer." (Plaintiff's memorandum, pp. 4 and 5; Emphasis in the original).

Plaintiff's first argument which seeks completion of the tender offer must fail. There can be no question that plaintiff cannot demand or force consummation of the tender offer. Inherent in every tender offer is the condition that the offer be held lawful by a court of competent jurisdiction if the tender offer is attacked. The Court of Appeals for the Second Circuit in Gulf & Western Indus., Inc. v. Great Atlantic & Pacific Tea Co., Inc. supra, in dealing with the claims of this plaintiff and others of this class, succinctly and unequivocally held that they, like G & W, have no "inherent right to proceed with an unlawful tender; a requirement of lawfulness is included by implication in every tender offer." 476 F. 2d at 698.

Thus, the only issue before this Court is whether plaintiff and the class of tendering shareholders he represents, can recover damages for the failure of the tender offer to proceed. Plaintiff's argument is based on his notion that at least by the 13th of February, 1973, a contract between the tendering shareholders and G & W existed and therefore when G & W failed to perform through no fault of the plaintiff, G & W became liable for damages. As was suggested earlier, whether in fact a contract existed is not at all clear. However, even assuming arguendo that a contract did exist, it is this Court's view that the plaintiff is not entitled to recover.

Defendants seek to justify their non-performance of the tender offer by application of the doctrine of impossibility. It has long been held that where the occurrence of an event, circumstance, or governmental intervention not caused by any party renders performance impossible, the contract is extinguished, and all parties to it are automatically discharged. See Frenchman & Sweet, Inc. v. Philco Discount Corp., 21 A.D. 2d 180, 249 N.Y.S. 2d 611 (1964); Geo. Colon Contracting Corporation v. Morrison, 162 N.Y.S. 2d 841 (1954), aff'd 157 N.Y.S. 2d 927 (1956); 119 Fifth Avenue v. Taiyo Trading Co., 73 N.Y.S. 2d 774 (1947), aff'd 87 N.Y.S. 2d 430 (1949); Dolman v. United States Trust Co., 206 Misc. 929,

134 N.Y.S. 2d 508, aff'd 1 A.D. 2d 809, 148 N.Y.S. 2d 809, rev'd on other grounds, 2 N.Y. 2d 110, 157 N.Y.S. 2d 537;^{5/}
See also Restatement of Contracts, §§ 457 and 458.

The plaintiff, however, argues that defendants cannot be relieved of liability since the illegality intervening between the "contract" and execution was caused by the defendants. It is true that one who causes a supervening governmental interference cannot avail himself of the doctrine of impossibility. General Aniline & Film Corp. v. Bayer Co., Inc., 305 N.Y. 479 (1953); Seedman v. Friedman, 132 F. 2d 290, 296 (2nd Cir. 1942). The New York Court of Appeals in General Aniline & Film Corp. v. Bayer Co., Inc., supra, 305 N.Y. 479 (1953), made clear that to be barred from raising this defense a party must have affirmatively, intentionally and directly caused the impossibility. It is plaintiff's contention that the impossibility here is based on a determination that the tender offer is unlawful because its consummation would result in violation of the antitrust laws and that certain papers released in conjunction with the offer violated the Securities Acts. The impossibility here, at least to the extent it is based on the antitrust violations, cannot be said to be caused by any particular party. If there be an antitrust violation here, it is the result of the juxtaposition of facts which were not intentionally incurred by defendants.

The defendants have from the beginning denied that in fact the acquisition of the tendered shares would create potential market conditions violative of the antitrust laws. Nor have defendants acknowledged that they have violated the Williams Act. It cannot be suggested that defendants have sought to extract themselves from this contract by their own purposeful acts. On the contrary, they have vigorously sought to defend against such alleged violations.

In a very real sense there is in this case, in its present posture, no illegality or unlawfulness but rather impossibility. As was made explicitly clear in my opinion prohibiting the consummation of the tender offer and in the affirmance of that opinion by the Court of Appeals, the merits of the alleged violations of the Securities and Anti-trust Laws have not been determined. At most, what is apparent is that the issues surrounding these alleged violations are substantial and difficult. The impossibility in this case rests on the finding of this Court, affirmed by the Court of Appeals, that issues raised by A & P, not G & W, are such that preliminarily this tender offer should not go through. If any party is going to be characterized as an efficient cause of the impossibility here, then A & P must bear that stamp, not G & W.

Even if it were this Court's finding that G & W had by its acts caused some sort of illegality here, plaintiff could not recover. As the Restatement of Contracts (1932) states in §599(b), " . . . a party who . . . may discover before or during performance the facts that render the bargain illegal . . . cannot recover for any performance rendered after the discovery." Thus, to recover a party must be ignorant of the facts constituting the illegality at the time the contract becomes irrevocable for him. As plaintiff stated in his papers, he tendered the shares some time after the 2nd of February and before the 13th of the month. As of the 5th of February, all shareholders of A & P can be held to be on notice^{6/} of the pendency of the litigation regarding the propriety of the tender offer, and clearly the result of this litigation is the basis of the impossibility of performance here. At that time, under the terms of the tender offer any tendering shareholder could have withdrawn his shares. The contract was not to be final until the end of the day on the 13th of February. Thus, even if this Court were of the persuasion that there were illegality here, it must be assumed that plaintiff was on notice of the facts comprising the impossibility, namely allegations of Antitrust and Securities Acts violations to an extent which would preclude his recovery.

The unsettling irony of this case is that plaintiff seeks damages for a contract which he asserts is breached and illegal, while at the same time continues to tender his shares in hopes of the ultimate consummation and performance of that very contract.

All of this might suffice to deny the plaintiff's motion for summary judgment. There is moreover, serious question as to the issue of what, if any, damages the plaintiff and the class he represents have sustained. This point has not been briefed by either side. But I seriously question what, if anything, could be assessed as damages. The defendants have extended the tender offer three times but each extension of the offer has permitted plaintiff and the class which he represents to withdraw any shares which may have been tendered. Plaintiff and the class, thus, have not been deprived of the use of their shares.

Plaintiff apparently seeks to have the defendants execute its tender offer to buy the shares (or at least pay for them) and "sterilize" them so that defendants could not exercise control over them. This precise argument was made by this plaintiff in the Court of Appeals and was rejected by that Court.

G & W claims that it "has been discharged from its obligations under the offer [by the order of this Court as

affirmed by the Court of Appeals]. As a result, it owes no duty to pay damages to disappointed shareholders." (G & W Reply Memorandum, p. 6.) On this basis, inter alia, G & W and Bludhorn have moved for summary judgment. The motion must be granted but for reasons much more limited than those stated by the defendants.

While a tender offer is in effect (even an extended one as here) the person or persons making the offer do have obligations. They have a duty of dealing fairly with the persons making the tender. There is no evidence that the defendants have done anything other than deal fairly with plaintiff and the class he represents. However, since plaintiff and the class he represents have suffered no damage cognizable at law, the complaint must be dismissed.

Settle order on notice. The plaintiff is to bear the costs of this action and also the costs of notifying the members of the class he represents.

U. S. D. J.

Dated: New York, New York

July 25, 1973.

FOOTNOTES

- 1/ It should be of some interest to the appropriate body of the Pennsylvania Bar whether the plaintiff, a lawyer, truly purchased these shares as an investment for his pension plan or merely as a vehicle for this litigation in which counsel fees are sought.
- 2/ I am not unmindful of the fact that pleadings under the Federal Rules of Civil Procedure are to be interpreted most liberally. If this were the only action filed by this plaintiff, I might consider that it could be construed as including the Williams Act claims. Plaintiff himself, however, has construed this action as one raising contract claims, not Securities Act violations. (See paragraphs 18 and 32 of the complaint in 73 Civ. 2931, which case, though filed in the Eastern District of Pennsylvania, has been transferred to this district and assigned to me as a related case.)
- 3/ No motion has been made to consolidate the two cases.
- 4/ A reading of the tender offer indicates that such an interpretation is not without substantial doubt. It seems to me that a tender offer is really a solicitation of offers from the tendering parties or in other words an "offer for an offer". Williston, in his treatise on contracts, suggests this view: "Ordinarily advertisement for bids or tenders is not itself an offer but the bid or tender is an offer which creates no right until accepted." Thus, no contract would arise until the acceptance of the tendered shares by the person publishing the tender offer. This view would demolish the plaintiff's claim of a violation of contract rights since no contract would ever have been created. However, I find it unnecessary to decide whether a contract actually existed, since in my view even if a contract was established, plaintiff cannot recover.

FOOTNOTES - continued

- 5/ This Court finds that the New York law must be applied in determining whether the doctrine of impossibility applies here. Even though jurisdiction of this suit is supposedly derived from the Securities Acts, I find it appropriate to look to New York law regarding questions of contract law since the offer and acceptance and at least part of the performance involved in this contract was to take place in New York. Further, federal law as to the application of the doctrine of impossibility is identical to that of New York law. See Seedman v. Friedman, 132 F. 2d 290 (2nd Cir. 1942) (a federal bankruptcy case), and the Kronprinzessin Cecilie, 244 U.S. 12 (1917) (an admiralty case).
- 6/ Plaintiff and the other members of the class, who have been characterized by plaintiff as "intelligent and alert" investors, can be held to be on notice of the possibility of litigation over the tender offer as early as the 2nd of February, when the President of A & P released a statement of opposition to the offer which was carried over the Dow-Jones tape. Further, the actual inception of the litigation between G & W and A & P on the 5th of February received very wide publicity in newspapers of general circulation, as well as business journals.

LETTER DATED JULY 30, 1973 TO HON. KEVIN T. DUFFY

100a

ABRAHAM E. FREEDMAN

COUNSELLOR AT LAW AND PROCTOR IN ADMIRALTY

36 SEVENTH AVE., NEW YORK, N. Y. 10011

929-8410

7

PHILADELPHIA, PA. OFFICE
FREEDMAN, BOROWSKY AND LORRY
CHESTNUT STREET AT FIFTH
WALNUT 8-8400

HARLES SOVEL
TANLEY B. GRUBER
ERBERT ZELENGO
ED R. PHILLIPS
OWARD M. KATZ
ARTIN L. KATZ
BORGE J. CAPPIELLO, JR.

July 30, 1973

Hon. Kevin T. Duffy
United States District Judge
Southern District of New York
U.S. Courthouse
New York, New York 10007

Re: Fred Lowenschuss, et.al. v. W. J. Kane, et.al.
73 Civil 2021 (KTD)

Dear Judge Duffy:

We take this opportunity to request that Your Honor withhold any further dissemination of your Opinion in the above matter until after plaintiff has had the opportunity to submit a Petition for Rehearing which will be filed within the 10-day period prescribed by the Rules.

On behalf of the individual plaintiff, Mr. Lowenschuss, we are particularly concerned about the statement made in footnote number 1 to your opinion which suggests that Mr. Lowenschuss may have been guilty of improper conduct. As will be more fully set forth in the Petition for Rehearing, the comments made in footnote number 1 are unwarranted under the facts of the case, particularly in view of the fact that plaintiff's request for oral argument in this matter was denied by the Court.

In footnote number 1, Your Honor questions whether Mr. Lowenschuss "truly purchased the shares as an investment for his Pension Plan or merely as a vehicle for this litigation in which counsel fees are sought". This statement overlooks the fact that, as was stated in paragraph 5 of Mr. Lowenschuss's affidavit, he purchased the shares not as an investment, and

not as a vehicle for litigation, but rather in order to tender them in response to G&W's tender offer. In addition, Mr. Lowenschuss can establish by irrefutable evidence that his order for the 2,000 shares of A&P stock that he purchased was placed prior to the announcement by A&P that it was contesting the tender offer. Mr. Lowenschuss can further establish that he attempted to cancel the order as soon as A&P announced that it was contesting the tender offer, but that, by that time, it already was too late for him to cancel his purchase.

In addition, at page 5 of Your Honor's Opinion, the statement is made that neither plaintiff nor other members of the class attempted to intervene in the litigation between the Gulf & Western and A&P. As will be more fully set forth in our Petition for Rehearing, this is in error, for Mr. Lowenschuss did file a petition to intervene in that litigation after the case was remanded from the Court of Appeals, but no action was taken on this motion and it is still pending.

As Your Honor notes in the opinion, Mr. Lowenschuss is a practicing attorney. A statement such as appears in footnote number 1 of the Opinion is extremely damaging to an attorney's reputation. We would hope that such a statement would not be allowed to stand without affording the attorney involved the opportunity for a hearing which, up to now, has been denied to Mr. Lowenschuss. We are confident that when the circumstances under which Mr. Lowenschuss acquired the stock are made fully known to the Court, that you will conclude that there has been nothing improper in Mr. Lowenschuss's conduct. In the meantime, however, if the Opinion as it presently stands, especially with present footnote number 1, is distributed for publication, Mr. Lowenschuss will suffer irreparable injury by reason of this blot on his reputation. Accordingly, we respectfully request that Your Honor withhold further dissemination of the Opinion, or recall it if it has been given out for publication, until plaintiff has had an opportunity to submit a Petition for Rehearing and additional materials which will establish that Mr. Lowenschuss acted in good faith in this transaction and in accordance with the

highest traditions of the Bar.

CS/gr

Respectfully submitted,

Charles Lovel

cc: Messrs. Simpson, Thacher & Bartlett
Messrs. Sullivan & Cromwell
Messrs. Cahill, Gordon & Reindel
Messrs. Olwine, Connelly, Chase, O'Donnell & Weyher

PLAINTIFF'S NOTICE OF MOTION FOR REARGUMENT (Filed August 3, 1973)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

103a

-----X
FRED LOWENSCHUSS, Trustee for Fred :
Lowenschuss Associates Pension :
Plan, Individually and on behalf of :
all other persons and shareholders :
of Great Atlantic & Pacific Tea :
Co., Inc. who are similarly :
situated, :

Plaintiff, :

vs. :

73 Civil 2021 (KTD)

NOTICE OF MOTION

W.J. KANE, H.J. BERRY, R.M. BROWN, :
JR., W. CORBUS, D.K. DAVID, H.C. :
GILLESPIE, J.S. KROH, E.A. LE PAGE, :
R.F. LONGACRE, M.D. POTTS, J.M. :
SCHIFF, P.A. SMITH, H. TAYLOR, JR., :
E.J. TONER, W.I. WALSH, N.F. :
WHITTAKER, J.A. ZIEGLER (all of whom :
are officers and directors of Great :
Atlantic & Pacific Tea Co., Inc.) :
and GREAT ATLANTIC & PACIFIC TEA CO., :
INC. and C.G. BLUHDORN and GULF & :
WESTERN INDUSTRIES, INC. and KIDDER, :
PEABODY & CO., :

Defendants. :

-----X

S I R S:

PLEASE TAKE NOTICE that plaintiff will move the Court before
the Honorable Kevin T. Duffy in Room 129 of the United States
Courthouse, Foley Square, New York, New York on the 14th day of
August, 1973, at 2:15 o'clock on the afternoon of that day, or
as soon thereafter as counsel may be heard, for an order granting
reargument of the Court's decision of July 25, 1973 in the within
matter.

PLEASE TAKE FURTHER NOTICE that at the aforesaid time and
place plaintiff will move the Court for leave to file the

annexed affidavits of Jay Moss, sworn to the 1st day of August, 104a
1973, and Fred Lowenschuss, sworn to the 30th day of July, 1973,
and that said affidavits be considered by the Court in its
determination of the within motion for reargument.

PLEASE TAKE FURTHER NOTICE that at the aforesaid time and
place plaintiff will move the Court to grant an oral hearing to
plaintiff on the within motion for reargument.

PLEASE TAKE FURTHER NOTICE that at the aforesaid time and
place plaintiff will move the Court to grant such other and
further relief as to the Court may seem just and proper in the
circumstances.

Dated: New York, New York
August 3, 1973

Yours, etc.

ABRAHAM E. FREEDMAN and
FRED LOWENSCHUSS ASSOCIATES

by Charles A. Freed
36 Seventh Avenue
New York, New York 10011
Attorneys for Plaintiff

TO:

MESSRS. SIMPSON, THACHER & BARTLETT
Attorneys for Defendants, C.G.
Bluhdorn and Gulf & Western Industries, Inc.
One Battery Park Plaza
New York, New York 10004

MESSRS. SULLIVAN & CROMWELL
Attorneys for Defendant,
Kidder, Peabody & Co.
48 Wall Street
New York, New York 10005

MESSRS. CAHILL, GORDON & REINDEL
Attorneys for Defendant,
Great Atlantic & Pacific Tea Co., Inc.
80 Pine Street
New York, New York 10005

MESSRS. OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
Attorneys for Defendants, Officers
and Directors of Great Atlantic & Pacific Tea Co., Inc.
299 Park Avenue
New York, New York. 10017

AFFIDAVIT OF JAY MOSS IN SUPPORT OF FOREGOING MOTION
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

106a

-----x
FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan,
Individually and on behalf of all other
persons and shareholders of Great
Atlantic & Pacific Tea Co., Inc. who
are similarly situated,

Plaintiff,

-against-

73 CIV. 2021

W. J. KANE, H. J. BERRY, R. M. BROWN, JR.,
W. CORBUS, D. K. DAVID, H. C. GILLESPIE,
J. S. KROH, E. A. LE PAGE, R. F. LONGACRE,
M. D. POTTS, J. M. SCHIFF, P. A. SMITH,
H. TAYLOR, JR., E. J. TONER, W. I. WALSH,
N. F. WHITTAKER, J. A. ZEIGLER (all of whom
are officers and directors of Great Atlantic
& Pacific Tea Co., Inc.) and GREAT ATLANTIC
& PACIFIC TEA CO., INC. and C. G. BLUHDORN
and GULF & WESTERN INDUSTRIES, INC. and
KIDDER, PEABODY & CO.,

Defendants
-----x

A F F I D A V I T

COMMONWEALTH OF PENNSYLVANIA :
: SS
CITY & COUNTY OF PHILADELPHIA :

JAY MOSS, being duly sworn according to law deposes and
says that:

1. I am a registered securities broker and represen-
tative and am employed by the stock brokerage firm of Herzfeld &
Stern in its Philadelphia Office.

2. On Friday, February 2, 1973, Fred Lowenschuss, as
Trustee for the Fred Lowenschuss Pension Plan, placed an order with
me for the purchase of 2000 shares of A & P Stock at a price of
18-5/8 with instructions to tender same to Gulf & Western in accor-
dance with the outstanding tender offer.

3. Before placing this order, Mr. Lowenschuss had dis-
cussions with me pertaining to said tender offer and the Great
Atlantic & Pacific Tea Co. and that said order was placed by me

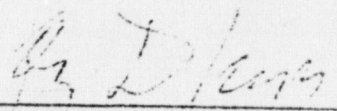
JAY MOSS

for execution at 10:48 A.M. A copy of said order is attached hereto and marked Exhibit "A".

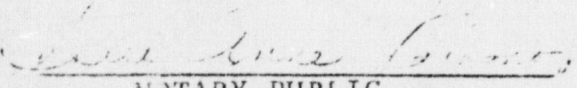
4. At or about 11:42 A.M., Mr. Lowenschuss instructed me to cancel the entire order. As I recall, at that time an announcement came over the Dow Jones ticker tape that A & P intended to oppose the tender. Upon my advising Mr. Lowenschuss of the aforementioned fact, he immediately instructed me to cancel the order which I attempted to do. Notwithstanding my attempted cancellation, it was too late and the order was executed for 600 shares at 18-5/8.

5. Later that day, after further discussions with Mr. Lowenschuss, I reduced the remaining portion of the order for 1400 shares to 18-3/8 and said order was properly executed at 18-3/8, the designated price. Prior to reinstating the order, I recall further conversations pertaining to the tender offer and discussing considerations of reduced commissions per share on the larger order.

6. Mr. Lowenschuss had been interested in the depressed shares of the various supermarket chains and I had, from time to time, previous to February 2, 1973, forwarded to him Standard & Poor's Investment Information pertaining to A & P shares as well as other companies.


JAY MOSS

Sworn to and subscribed
before me this 1st day
of August, 1973.


NOTARY PUBLIC

TERESA ANNE FLANNERY, Notary Public
Harrisburg, Delaware County, Pa.

EXHIBIT A - STOCK ORDER ANNEXED TO J. MOSS AFFIDAVIT

108a

J
U
Y

Grant 10/1/1
 2:00 10:40 AM '13

CAT 18 3/8

☐ DAY 12 1/2 ☐ G.T.C.

name & address

Fred E. Oakes & Co.
 Assoc. Pension Plan

| | | | | |
|----|-------|---|---|----|
| 06 | 38558 | 1 | 1 | 12 |
|----|-------|---|---|----|

B
O
O
K
I
N
G

2:30 PM
 13:00 - 18 5/8
 14:00 - 18 3/8

ORIGINAL

AFFIDAVIT OF FRED LOWENSCHUSS IN SUPPORT OF FOREGOING
UNITED STATES DISTRICT COURT MOTION DATED JULY 30, 1973
SOUTHERN DISTRICT OF NEW YORK

-----x
 FRED LOWENSCHUSS, Trustee for Fred
 Lowenschuss Associates Pension Plan,
 Individually and on behalf of all other
 persons and shareholders of Great
 Atlantic & Pacific Tea Co., Inc. who
 are similarly situated,

Plaintiff

-against-

W. J. KANE, H. J. BERRY, R. M. BROWN, JR.,
 W. CORBUS, D. K. DAVID, H. C. GILLESPIE,
 J. S. KROH, E. A. LE PAGE, R. F. LONGACRE,
 M. D. POTTS, J. M. SCHIFF, P. A. SMITH,
 H. TAYLOR, JR., E. J. TONER, W. I. WALSH,
 N. F. WHITTAKER, J. A. ZEIGLER (all of whom
 are officers and directors of Great Atlantic
 and Pacific Tea Co., Inc.) and GREAT ATLANTIC
 & PACIFIC TEA CO., INC. and C. G. BLUHDORN
 and GULF & WESTERN INDUSTRIES, INC. and
 KIDDER, PEABODY & CO.,

Defendants

73 CIV. 2021

-----x
A F F I D A V I T

COMMONWEALTH OF PENNSYLVANIA :
 : SS
 CITY & COUNTY OF PHILADELPHIA :

FRED LOWENSCHUSS, being duly sworn according to law,
 deposes and says:

1. That on February 28, 1972, the District Director
 of Internal Revenue Service, Alfred Whinston, determined that the
 Fred Lowenschuss Associates Pension Plan and Pension Trust was
 qualified under Section 401 or 405 of the Internal Revenue Code
 and exempt under Section 501(a) of the Internal Revenue Code.
 (Copies of said letters of determination are attached hereto and
 marked Exhibit "A".)

2. A savings account had been opened entitled Fred Lowenschuss, Trustee for Fred Lowenschuss Associates Pension Plan, Attorneys At Law, in the Western Savings Bank in Philadelphia, Account No. 01-175535-6.

3. Said savings bank paid interest of 5% up until recently at which time the interest rate has been increased to 5-1/4%.

4. That the employer contributions to the pension trust were initially made/into the aforementioned savings account until such time as I, as Trustee of the pension plan, could determine appropriate investments to obtain a better return and/or increase the pension plan funds.

5. Like most persons, I was concerned about the erosion of the dollar by reason of the present inflationary trend and I was aware that 5% interest received on the pension plan funds did not constitute a good return on said monies and did not keep the corpus at a status quo.

6. I had been interested in the prospects of the supermarket chains as an area for investment for a long period of time, and, for the period six months preceding February 2, 1973, I had been actively studying and evaluating the various supermarket chains by obtaining Standard & Poor reports from brokers and constantly following the market quotations of the various supermarkets' securities.

7. I was particularly interested in the Great Atlantic & Pacific Tea Co. as a turn around situation and as a slumbering giant.

8. For at least six months prior to February 2, 1973, I was actively and constantly following the common stock quotations of A & P and the corporate developments of said company.

9. During this time, I felt that the stock market was in a precarious position and that the downside risks greatly outweighed the upside potentials.

10. My evaluation of the A & P stock was that it should gravitate to the \$10.00 per share area, at which time I felt it would be a good investment for a turn around situation.

11. I continued to watch the quotations of said A & P stock and could not figure out why the quoted price of said stock failed to decrease to the \$10.00 level and, in fact, shortly prior to the tender offer being announced, began to increase in value; toward the end of January the quoted price of A & P stock began to stabilize and increase.

12. When the announcement of the Gulf & Western tender offer was made, I was a bit perturbed for not having anticipated or realized that something of this nature was happening or in the wind. Like most persons, I felt that my 20/20 vision, in hindsight, should have motivated my actions at an earlier date.

13. On February 2, 1973, prior to the time that trading on the New York Stock Exchange commenced, and sometime around 9:00 A.M. in the morning, I read the tender offer of Gulf & Western for 3.75 Million shares of A & P stock. Having followed A & P stock for the last six months, and being a bit peeved at myself for not investing earlier, and further being cognizant of the fact that the pension fund needed a better return than 5% interest in order to at least maintain the purchasing value of said fund, I determined to purchase on behalf of the pension fund,

2000 shares of A & P stock at 18-5/8 or less to tender same to Gulf & Western at \$20.00 per share. I felt that this was an excellent opportunity to earn 7% on investment made for fifteen days or less.

14. Prior to placing the order for the purchase of 2000 shares of A & P on the morning of February 2, 1973, with instructions at the time of placing the order of tendering said shares, I read and re-read the tender offer of Gulf & Western as it appeared on page 18 of the Wall Street Journal on Friday, February 2, 1973. I read said tender offer as an attorney being asked by clients what are the rights, obligations and risks of the parties making the tender offer and the persons who respond to same. My professional opinion as an attorney was that Gulf & Western was obligating itself to purchase any and all shares properly tendered on or before February 13, 1973, up to 3.75 Million shares. The express terms of the tender offer of Gulf & Western were so set forth that I, as an attorney, understood it to be an irrevocable offer of a unilateral contract which was accepted by the tendering of the shares, and consummated thereby. My evaluation of the tender offer, as an attorney and Trustee for the pension plan, was based in part on the following language in the tender offer:

".....'G & W' hereby offers to purchase 3,750,000 shares of common stock...."

G & W will purchase all shares of A & P common stock which have been duly tendered by 5:00 P.M. E.S.T. on Tuesday, February 13, 1973, up to the maximum of 3,750,000 shares. If more than 3,750,000 shares (approximately 15% of the outstanding shares) are tendered by February 13, 1973, G & W will purchase 3,750,000 shares on a pro rata basis and reserves the right, but will not be obligated, to purchase any number of additional tendered shares on a pro rata basis...."

(As appears on Page 18 of the Wall Street Journal with emphasis supplied)

15. I also relied on the "letter of tender" printed in the Wall Street Journal together with the tender offer. Contained in said letter of tender was the following language:

"....tendered pursuant to the offer dated February 1, 1973, of Gulf & Western Industries Inc. to purchase 3,750,000 shares of A & P common stock for cash at \$20.00 net per share.

Shares of common stock of the Great Atlantic & Pacific Tea Company, Inc. ("A & P") may be tendered pursuant to the offer to purchase dated February 1, 1973, of Gulf & Western Industries Inc."

16. In formulating my opinion that this was an irrevocable, unilateral offer to purchase a minimum of 3.75 Million shares of A & P, I also relied heavily on paragraph #6 of the G & W tender offer. Said paragraph provides a reduction in the purchase price in the event of dividend payment by A & P and/or certain distributions as set forth therein. Again, G & W was affirming that this tender offer for at least 3.75 Million shares imposed a firm obligation on G & W, thereby encouraging members of the general public to act and/or change their position.

17. A reading of the remaining portions of the tender offer indicated to me that the investment firm of Kidder, Peabody & Co., Inc. aided G & W and/or its chairman, in making said tender offer. I also noted that one of the senior partners of the law firm of Simpson, Thatcher & Bartlett, Esquires (who were general counsel for G & W) was a director of the G & W corporation. In reading the remainder of the tender offer, there were no conditions and/or disclaimers or caveats which could possibly defeat a tendering shareholders right to payment of \$20.00 per share, other than the fact that more than 3.75 Million shares may be tendered causing a pro-rata acceptance. As Trustee of the pension plan, I accepted the possibility of the pension plan continuing to hold a portion of the 2000 shares of A & P stock in the event that the tender offer was over subscribed and the pro-rata acceptance provision of the offer of G & W applied. Since G & W was

going to end up owning and/or holding close to 5,000,000 shares of A & P, after the tender offer was completed, I felt it was a reasonable risk to take to hold A & P shares for further appreciation. I further felt that this tender offer was placing a large block of A & P stock into the "strong hands" of G & W and removing said shares from "weak hands" of the general public. Stockholders of A & P wishing to sell their shares would tender same and thereby remove selling pressure on A & P shares. The combination of the general public's confidence engendered by G & W's actions, together with the removal of the selling pressure on A & P shares, would have a positive effect on the quoted price of A & P stock.

It was my feeling that G & W, in order to insure the success of its tender offer, carefully and consciously chose the firm terminology used in the offer. Because the quoted price of the A & P shares of stock had dropped substantially over the past year or so, numerous shareholders had paid greatly in excess of \$20.00 per share for their holdings. Acknowledged stockholder psychology is that a shareholder will take a profit and hold on to his losing stocks. Under these circumstances, I interpreted the firm language of the tender offer as being calculated by G & W to induce and encourage members of the general public to go out and purchase shares on the open market for the purpose of tendering.

I relied on the expertise of G & W, its chairman, Charles G. Bluhdorn, its investment banker Kidder, Peabody & Co. and its attorneys (all of whom have previously been involved in tender offers) that this was a valid and legal tender offer.

18. My decision to purchase the shares of A & P for the purpose of tendering was made prior to 10:00 A.M. on February 2, 1973. I waited to place the order for said shares until after the market opened so that I might obtain a quotation and feel of the market. The order was placed and my broker advises at 10:48 A.M.,

in accordance with my instructions, he placed the order for 2000 shares of A & P stock at 18-5/8. Thereafter, I received a call from my broker, Jay Moss, of Herzfeld & Stern, who advised that a notice had just appeared or was appearing to the effect that A&P and/or its officers and directors intended to oppose the tender offer. I IMMEDIATELY INSTRUCTED MY BROKER TO CANCEL MY ORDER FOR 2000 SHARES AND WITHDRAW SAME. AT 11:42 A.M. MY BROKER ATTEMPTED TO CANCEL THE ORDER FOR 2000 SHARES OF A & P STOCK, BUT THE ORDER HAD ALREADY BEEN EXECUTED TO THE EXTENT OF 600 SHARES. Upon learning of the partial execution of my order, I re-evaluated the situation and reread the Gulf & Western tender offer. My interpretation of A & P's opposition to the tender offer was that the officers and directors of A & P would advise their shareholders not to tender because of alleged inadequacy of the \$20.00 per share offer.

I further felt that the opposition of A & P's management to the tender offer would in no way affect the tendering shareholders or cause them to suffer harm in that Gulf & Western had obligated itself to pay for any and all shares up to 3.75 Million properly tendered on or before February 13, 1973. In fact, I was of the opinion that A & P's opposition to the tender offer would cause the number of shares tendered to be less, and in that way would assure a greater percentage, if not all, of the tendered shares to be paid for by G & W under its obligation for 3.75 Million shares tendered. I then noticed that the market was only reacting slightly to the announcement of A & P's opposition and I therefore reduced and reinstated my order for the remaining 1400 shares at 18-5/8 to complete the original contemplated purchase and tender of 2000 shares. Reduced commissions per share on the larger purchase was an additional consideration influencing my decision.

19. The next information which I received pertaining to A & P's opposition appeared in the Wall Street Journal on Monday, February 5, 1973, on page 20, the message of William J. Kane, Chairman of A & P to A & P shareholders. The fact that chairman Kane indicated to A & P shareholders that it was not in their best interest to accept the \$20.00 per share inadequate price made me think that maybe I should re-evaluate the situation once again. After re-evaluation, I again determined that \$20.00 per share was most adequate under the present circumstances and I didn't change my instructions for tendering said shares. The fact that Chairman Kane stated that:

"Our attorneys have advised us that the acquisition by Gulf & Western of a large block of A & P shares of stock raises serious questions of the the anti-trust laws and we have instructed them to take whatever action deemed appropriate to protect A & P's interest."

did not alter my opinion of the legal effect of the tender offer.

I relied on the investment firm of Kidder, Peabody & Co. and Gulf & Western's attorneys having taken all necessary steps to insure the legality of the tender offer.

20. Thereafter, upon learning of the legal action pending before the District Court in the Southern District of New York between G & W and A & P, my thought processes went as follows:

- (a) G & W was suing A & P for misstatements to A & P shareholders. I was not affected by that lawsuit or assertion in that I decided to tender the 2000 shares regardless of what A & P had stated or was stating in its opposition campaign.

(b) That A & P's counterclaim pertaining to alleged anti-trust and securities laws violations was being adequately defended by the attorneys for Gulf & Western. I had no information or evidence pertaining to any possible anti-trust violations and/or defenses for same. Similarly, pertaining to any possible securities law violations or Williams Act violations, I was satisfied to receive \$20.00 per share for the tendered shares and had no evidence at that time on the question of said securities violations. I felt that the Court would be aware of the fact that there were tendering shareholders who were desirous of obtaining payment for their tendered shares.

Therefore, for the aforementioned reasons, I did not seek to intervene in the original inter-corporate litigation between G & W and A & P which resulted in this Court's injunction being issued on February 13, 1975. Again, with the 20/20 vision provided by hindsight, it would have been better to have intervened and developed the position of the tendering shareholders. It must be remembered that,

as of that time, I did not know how many shares were being tendered or would eventually end up being tendered, and with the available information and the limited time to act, I cannot fault myself for not intervening.

21. In order to immediately apprise G & W, A & P, their respective officers and directors, Kidder, Peabody & Co., their attorneys, and the Courts of the position of the tendering shareholders, I immediately filed (February 15, 1973) the action in the Eastern District of Pennsylvania so as to set forth the position and interests of the tendering shareholders.

22. I also petitioned the Second Circuit Court of Appeals for permission to intervene and/or file a brief amicus curiae in the pending appeal arising out of the G & W and A & P litigation which had resulted in a preliminary injunction. Although the Second Circuit Court of Appeals refused to allow me to intervene, it did allow me, as well as several others, to file briefs amicus curiae.

23. It was not until after the matter was before the Second Circuit Court of Appeals that I became apprised of the fact that a majority of the shareholders of A & P were in favor of the G & W tender offer. If I had known that fact during the pendency of the District Court Action prior to February 13, 1973, I feel certain that I would have taken some action to apprise the Court of that fact. It was my desire that the tender offer be legally consummated so that the parties to the tendering contract would receive the benefits they had anticipated. I felt that G & W had taken and/or could and would take the necessary steps to comply with the securities laws and the anti-trust laws. This acquisition by G & W constituted one of the largest investments in

had ever made, representing a commitment of approximately \$100,000,000 or more. Prior to making this tender offer and commitment, G & W and its Chairman, Charles G. Bluhdorn and the other officers and directors of G & W - Messrs. Abbott, Dolkhart, and Levien had tendered their resignation from the Board of Directors of one of A & P's competitors Bohack, and a voting trust had been established for shares of stock in Bohack owned by Mr. Bluhdorn. It was not until the case was argued before the Second Circuit Court of Appeals that I received the first inkling or hint that G & W insisted on consummating the tender on its terms only and might not take the steps necessary to have the Courts allow it to proceed.

This was brought to light during the argument before the Second Circuit Court of Appeals when Judge William H. Timbers asked the attorney for G & W, Whitney North Seymour, Sr. whether he could assure the court that G & W would not seek any further amounts of A & P stock. When Mr. Seymour replied that there weren't any present plans to acquire more shares, but he didn't think his client should be "frozen" on the matter, I feel that this was an important consideration in this matter. In this manner, G & W has caused the Courts to enjoin the tender offer and thereby created its own impossibility to perform.

24. After the Second Circuit Court of Appeals upheld the preliminary injunction issued by this Court, and returned the matter for expedited proceedings, I immediately filed a motion to intervene at the District Court level in the action between corporate defendants, G & W and A & P, in order to protect the rights of the tendering shareholders. I also filed a motion for modification of this Court's injunctive order to allow payment by Gulf and Western for the tendered shares. In my covering letter of

March 19, 1973, to the Honorable Kevin Thomas Duffy enclosing copies of the motions to intervene and for modification of injunctive order, I requested permission to be allowed to help formulate a method by which the tender offer could be consummated and the matter amicably adjusted without the necessity of a lengthy trial. (Copy of letter dated March 19, 1973 to the Honorable Kevin Thomas Duffy attached hereto and marked Exhibit "B")

In taking the aforementioned actions, I was directly motivated by the closing words that appeared in the opinion of the Second Circuit Court of Appeals:

"Under all the circumstances, we suggest to the District Court that it expedite further proceedings in this case, as it so commendably has done to date, with a view to the earliest possible date for trial consistent with the rights of the parties. We are confident that counsel will fully cooperate to that end."

I have at all times advised all parties concerned of my position that the tendering shareholders are entitled to be paid for the tendered shares or in the alternative, that damages should be awarded to the tendering shareholders. Said damages should be computed as the difference between the agreed upon tendered price of \$20.00 per share and the price at which the tendering shareholders were able to dispose of the tendered shares. All parties concerned were also apprised of the fact that plaintiff herein, as well as numerous other persons, substantially changed their position in either purchasing shares of A & P for purposes of tender and/or failing to sell the shares which they owned on the open market because of what they believed was a legal tender offer which obligated G & W to pay for same. Said shareholders were further misled by the continued extensions of the tender offer pending the outcome of the litigation, when in reality G & W had

determined to keep the tender offer open for the sole purpose of defeating the claim of the tendering shareholders.

25. On April 23, 1973, after having received A & P's Memorandum in Opposition to my Motion to Intervene, I again wrote to the Honorable Kevin Thomas Duffy, a copy of which letter is attached hereto and marked Exhibit "C". Said letter, among other things, requests a hearing to be held so that the parties could articulate their intentions.

26. Not having heard anything further from this Court pertaining to the Motion to Intervene, and/or for modification of the Court's order, and/or for the fashioning of a legal tender offer by G & W, I again wrote the Court on May 3, 1973 a copy of which letter is attached hereto and marked Exhibit "D". In said letter, I specifically requested that the Court enter an interim order in Civil Action No. 73-536 between Gulf & Western and A & P wherein I was to receive copies of any and all discovery proceedings and/or copies of all papers filed with the Court. In spite of the foregoing, it was not until June 15, 1973, after I had retained New York counsel, Charles Sovel, Esq., that I learned that this Court, at the request of G & W and A & P had entered a 45 day stay order on or about May 16, 1973. Neither the Court nor the counsel for G & W, A & P, and/or Kidder, Peabody & Co. ever advised me of said stay order and/or the circumstances surrounding same. Furthermore, I have recently learned that a second stay order was entered on or about July 20, 1973, for a period of 30 days under similar circumstances.

It is important to mention that the only information I received pertaining to the inter-corporate litigation between G & W and A & P was a letter dated May 7, 1973 from John A. Guzzetta, Esquire advising of an argument held on Friday, May 4, 1973, before Judge Kevin Thomas Duffy pertaining to third party

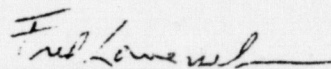
witness Jack Skilowitz, to vacate a subpoena duces tecum and/or in the alternative for a protective order. (A copy of Mr. Guzzetta's letter dated May 7, 1973 is attached hereto and marked Exhibit "E")

On May 10, 1973, I wrote to Attorney Guzzetta requesting copies of all pleadings and motions filed in the G & W and A & P case and, in particular, copies of the motions and briefs filed pertaining to the motion of the witness Jack Skilowitz. (A copy of said letter dated May 10, 1973, is attached hereto and marked Exhibit "F") I received no response from Attorney Guzzetta.

27. On or about May 7, 1973, I filed a second action against Gulf & Western, its chairman Charles G. Bluhdorn and Kidder, Peabody & Co., Inc. wherein a more limited class of plaintiffs are defined and alleging specific securities act violations. The second class definition encompasses those purchasers of A & P shares on the open market after the announcement of the tender offer.

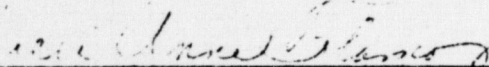
28. It was always my belief that the action of Gulf & Western vs. A & P and this action should be consolidated for trial in the Southern District of New York; in fact, I requested Judge Clarence C. Newcomer of the Eastern District of Pennsylvania that to make/one of the conditions of transfer. At this time, I request that all three actions (G & W vs. A & P; Lowenschuss I, and Lowenschuss II be consolidated in order to conserve judicial resources and to expedite final resolution of the underlying controversies.)

I hereby aver the foregoing affidavit to be true and correct to the best of my knowledge, information and belief.



FRED LOWENSCHUSS

Sworn to and subscribed
before me this 30th day
of JULY, 1973.



NOTARY PUBLIC

THAT ANNE FLAYOR, Notary Public
Haver, Calif., Delivered On: 7/31/73
My Commission Expires April 4, 1977

EXHIBITS ANNEXED TO AFFIDAVIT OF FRED LOWENSCHUSS

EXHIBIT A - IRS LETTER OF DETERMINATION DATED FEBRUARY 28, 1972

124a

Address any reply to: 401 N. Broad St., Philadelphia, Pa. 19106

Department of the Treasury

District Director

Internal Revenue Service

Date: FEB 28 1972

In reply refer to:

AU:1103

Tel. (215) 597-4101

FIELD OFFICE - PHILADELPHIA
ATTENTION: AT 200 N.
121 SOUTH BROAD STREET
PHILA. PA. 19107

NAME: JAMES D. HARRIS ASSOCIATES
DATE: 2-1-71 REVISED 12-30-71

Based on information supplied, we have determined that this plan, with the amendments, as shown above, is qualified under section 401 or 408 of the Internal Revenue Code.

Continued qualification of the plan will depend on its effect in operation as well as its present form. (See section 1.401-1(b)(3) of the Income Tax Regulations.)

Employer contributions under the plan are deductible in accordance with the conditions and limitations of section 404 of the Code. If contributions are deducted, you must file Form 990 (Form 990-SS if the plan includes self-employed individuals) and any information required under section 1.404(a)-2 of the regulations.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

Please notify us if you terminate this plan.

For guidance in ascertaining whether your plan falls within the coverage and salary standards, see the regulations issued by the IRS under the authority of the Economic Stabilization Act of 1970 as amended. We will be pleased to entertain any questions which you may have regarding The Economic Stabilization Program.

Sincerely yours,

Harold L. Winston
District Director

REPLY TO A PRESENTED ADDRESS

Department of the Treasury

In reply to DISTRICT DIRECTOR at office No. 3District Director
Internal Revenue ServiceDate: FEB 28 1972 in reply refer to: 100-1112

*Re: [illegible] Association
[illegible] Trust
[illegible] Trust
[illegible] Trust*

*In Re: [illegible] Association
[illegible] Trust*

Trust ☒
Custodial Account ☐

Based on information supplied, we have determined that the above trust/custodial account, forming part of a qualified plan, is exempt under Section 501(a) of the Internal Revenue Code.

The trust/custodial account is subject to the following provisions of the Code: section 502 (relating to feeder organizations), section 503 (relating to prohibited transactions), and sections 511 through 515 (relating to tax on unrelated business income).

The following returns must be filed:

Form 990-P, Return of Employees' Trust Exempt From Tax, as required by regulations under section 6033 of the Code.

Form 990-T, Exempt Organization Business Income Tax Return, as required by regulations under section 6012 of the Code, if you realized unrelated business income.

Forms 1099 and 1090, U.S. Information Returns, as required by regulations under code section 6041, or 6047.

Amounts distributed or made available to employees or their beneficiaries are taxable according to the provisions of section 402(a) of the Code.

Under section 1.72-16(b) of the Income Tax Regulations, that part of the insurance premiums paid for life insurance protection will constitute income to the employee in the year in which the premium is paid.

Please notify us if the trust/custodial account is terminated.

Sincerely yours,

District Director

KEEP AS A PERMANENT RECORD

Form L-125 (Rev. 9-70)

ONLY COPY AVAILABLE

March 19, 1973

Honorable Kevin Thomas Duffy
U. S. District Court Judge
for the Southern District of
New York
United States Court House
Foley Square
New York, New York 10007

Re: Gulf & Western Industries Inc.
vs: The Great Atlantic and Pacific Tea Co.,
Inc.
vs: Charles G. Bluhdorn and Kidder, Peabody
& Co. Inc. 73 CV Action 536 K. P. D.

Dear Judge Duffy:

I am submitting to Your Honor a copy of Motion to Intervene and Motion for Modification of Your Honor's Order, the original of which we will file with the Clerk of the U. S. District Court for the Southern District on March 30, 1973. We are sending copies of these Motions to all interested counsel as set forth in our Notice of Motions.

We respectfully request the opportunity to present oral argument for our Motion for Modification of this Court's Injunctive order. We would like to assist in formulating some method by which this matter may be disposed of without a lengthy trial.

Respectfully submitted,

Dennis McInerney, Esq.
Whitney North Seymour, Esq.
Robert P. Ambrose, Esq. FRED LOWENSCHUSS
Eugene J. Loff, Esq.
Henry T. Roath, Esq.
Edward H. Mullinix, Esq.

EXHIBIT C - LETTER TO HON. KEVIN THOMAS DUFFY DATED
APRIL 23, 1973

LAW OFFICES
FRED LOWENSCHUSS ASSOCIATES
ATTORNEYS-AT-LAW
SUITE 1822
TWO PENN CENTER PLAZA
15th AND JOHN F. KENNEDY BOULEVARD
PHILADELPHIA, PENNSYLVANIA 19102

April 23, 1973

PHONE LO3-0606
AREA CODE 215

Honorable Kevin Thomas Duffy
United States District Judge
for the Southern District of New York
Foley Square
New York, New York 10007

Re: Gulf & Western Industries, Inc.
vs: Great Atlantic & Pacific Tea Co. Inc.
et al, Docket No. 75-Civ. Action #530
(K. T. D.) and Fred Lowenschuss Pension
Plan, et al
vs: A & P and Gulf Western, et al
Civil Action #75-339, U. S. District
Court for the Eastern District of Penna.

Dear Judge Duffy:

I have just received A & P's memorandum in opposition to our motion to intervene as of right and motion to modify the Court's injunctive order. It is most important to remember that these are two separate and distinct motions, even though A & P sought to treat them as one.

Most importantly, the memorandum of A & P fails to meet the most compelling reason for intervention, namely, the fashioning of a legal tender offer under

the guidance of this Court and with the aid of all parties concerned.

In order to obfuscate the aforementioned relatively expedient and efficient means for resolution of what would otherwise be protracted litigation, A & P has taken unwarranted liberties in its characterization of our position.

Nothing can be further from the truth, than the assertion by A & P that the A & P shareholders are attempting to proceed with an unlawful tender. In fact, as clearly stated in our brief in support of our separate motions for intervention and modification, we are enlisting the aid of this Court and the parties to this action, including A & P and its officers and directors to fashion a lawful tender offer. By doing this, we are not by any means attempting to re-argue matters which have previously been decided by the Second Circuit Court of Appeals.

In Seeking intervention, our aim is to conserve judicial resources and assist in providing a means of resolving the problems presented without the necessity of protracted litigation. It is evident from the memorandum allegedly filed on behalf of A & P by its attorneys, that the officers and directors of A & P are not desirous of having a legal tender offer fashioned and instead are choosing the avenue of protracted litigation. THIS IS CONTRARY TO THE EXPRESSED WISHES OF A MAJORITY OF THE VOTING SHAREHOLDERS OF A & P AS OUTLINED IN OUR BRIEF.

It is suggested that a hearing be held wherein each of the parties clearly articulate its respective position on the record, thereby crystallizing the real issues presented. At that time, the determination can be made whether or not this matter can be resolved in an amicable fashion or if it will be necessary for extensive litigation.

129a

In closing, it is important to reiterate that we have an interest in the merits of the case, and the parties of record cannot possibly develop and/or adequately present said interests.

Respectfully submitted,

FRED LOWENSCHUSS

FL/taf

c: Cahill, Gordon, Sonnett, Reindel & Ohl, Esquires
Simpson, Thacher and Bartlett, Esquires
Sullivan & Cromwell, Esquires

EXHIBIT D - LETTER TO HON. KEVIN THOMAS DUFFY DATED
MAY 3, 1973

May 3, 1973

Honorable Kevin Thomas Duffy
United States District Judge
for the Southern District of New York
Foley Square
New York, New York 10007

Re: Gulf & Western Industries, Inc.
Great Atlantic & Pacific Tea Company, Inc.
et al, Docket No. 73-536 (K.T.D.) and
Fred Lowenschuss Pension Plan et al
vs: A & P and Gulf & Western, et al
Civil Action No. 73-339, U. S. District
Court for the Eastern District of Penna.

Dear Judge Duffy:

I understand that there may be some discovery either taking place or contemplated in Civil Action #73-536. Pending Your Honor's determination on our outstanding Motion for intervention and/or Consolidation of the above two actions, I would greatly appreciate if Your Honor would enter an Interim Order in Civil Action No. 73-536, providing that this office is to receive notice of any and all discovery proceedings and/or copies of all papers that are filed with the Court.

I would like to point out that on April 17, 1973, I wrote to the respective counsel requesting copies of Bill of Costs and objections thereto which had been filed and, as of this date, have not received a response from them.

Respectfully submitted,

FRED LOWENSCHUSS

FL/taf

c: Cahill, Gordon, Sonnett, Reindel & Ohl, Esq.
Simpson, Thacher & Bartlett, Esq.
Sullivan & Cromwell, Esq.

EXHIBIT E - LETTER OF JOHN A. GUZZETTA DATED MAY 7, 1973 131a

SIMPSON THACHER & BARTLETT

ONE BATTERY PARK PLAZA

NEW YORK, N.Y. 10004

(212) 483-9000

TOWN OFFICE:
6 PARK AVENUE
NEW YORK, N.Y. 10022

WASHINGTON OFFICE:
1105 EYE STREET, N.W.
WASHINGTON, D.C. 20006

May 7, 1973

Re: Gulf & Western Industries, Inc. v.
The Great Atlantic & Pacific Tea
Company, Inc.

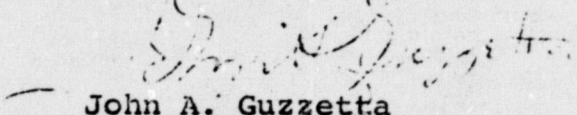
Fred Lowenschuss, Esq.
Fred Lowenschuss Associates
Suite 1022
Two Penn Center Plaza
1701 and John F. Kennedy Blvd.
Philadelphia, Pennsylvania 19102

Dear Mr. Lowenschuss:

In accordance with the instructions of the Honorable
Kevin Thomas Duffy, United States District Judge, United States
District Court for the Southern District of New York, this is to
advise you that last Friday, May 4, 1973, argument was had before
the Court on a motion by third-party witness Jack Skilowitz to
vacate a subpoena duces tecum and in the alternative for a pro-
tective order in connection with the scope of inquiry at a noticed
third-party examination before trial.

The Court took the matter under consideration.

Very truly yours,


John A. Guzzetta

JHG:rh

cc: Honorable Kevin Thomas Duffy
Cahill Gordon & Reindel

EXHIBIT F - LETTER OF FRED LOWENSCHUSS DATED MAY 10, 1973

May 10, 1973

John A. Guzzetta, Esquire
Simpson Thacher & Bartlett
One Battery Park Plaza
New York, New York 10004

Re: Gulf & Western Industries v. The Great
Atlantic & Pacific Tea Company, Inc.

Dear Mr. Guzzetta:

I have just received your letter dated May 7, 1973, which you wrote per instructions of Judge Duffy advising us of argument held on May 4, 1973 on motion by third-party witness Jack Skilowitz to vacata a subpoena duces tecum and/or a protective order. In order to make said information meaningful to us, we will need copies of the motions and briefs filed pertaining to said matter.

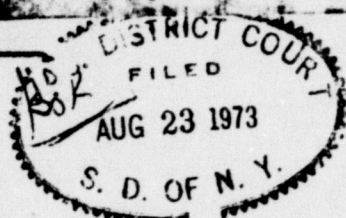
I would appreciate your forwarding to this office copies of all pleadings and motions filed in the above case so that we will be fully apprised. Thank you for your anticipated cooperation as well as the cooperation of other counsel involved.

Very truly yours,

FRED LOWENSCHUSS

FL/taf

c: Hon. Kevin Thomas Duffy
Cahill Gordon & Reindel
Sullivan & Cromwell



ENDORSEMENT OPINION OF DISTRICT COURT FILED
AUGUST 23, 1973

FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates
Pension Plan, et al. v. W. J. KANE, et al.

73 Civ. 2021

ENDORSEMENT

The motion for reargument is denied.

The plaintiff has taken a great deal of this Court's time to seek the removal of footnote #1 from the opinion. There is no finding of fact or conclusion of law in that footnote. It is merely meant as a suggestion to the appropriate body to make whatever findings and conclusions they may deem necessary.

I think it is appropriate, and indeed unfortunately necessary, that such reminders of duty be openly spelled out for the Bar. Only last month the President of the American Bar Association called for a rededication to the high ethical standards which lawyers should have. I am not condemning the plaintiff here -- by the footnote in the opinion I merely seek to awaken the Bar to make its own findings.

I will not permit the Bar or any member thereof to infringe on the prerogatives of this Court. Nor will I presume to usurp the basic functions of the Bar.

The second ground for reargument (other than my supposed bias) is that a motion which is dispositive of a class action cannot be made or decided until all members of the class are notified. I find this somewhat incongruous with the plaintiff's demand for summary judgment.

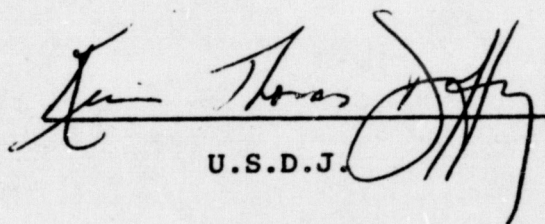
I do not claim to be all-knowing. I do rely on the attorneys who present their case to inform me. I did rely on the plaintiff's motion for summary judgment to mean that I could make the determination which I did.

It would seem that the plaintiff withheld this point to see whether he won or lost. I am morally certain that if plaintiff had won, the point would never have seen the light of day. But plaintiff lost, so it is trotted out at the last minute.

I see no reason at this point to change the decision which has been filed.

I would, however, be glad to hear from any other member of the class as to why my decision is not proper. Therefore, I order that the plaintiff notify all members of the class by mail within the next five days of my initial decision, which notification will also state if any member of the class seeks a redetermination of the matter that they may do so within twenty days from today.

SO ORDERED.


U.S.D.J.

Dated: New York, New York
August 23, 1973.

135a
LETTER FROM THE DISCIPLINARY BOARD OF THE SUPREME COURT
OF PENNSYLVANIA. DATED NOVEMBER 20, 1973



THE DISCIPLINARY BOARD
OF THE
SUPREME COURT OF PENNSYLVANIA

DISTRICT I OFFICE

809 Widener Building
Philadelphia, Pennsylvania 19107
(215) 563-2650

Chief Disciplinary Counsel
Allen B. Zerfoss

Assistant Disciplinary Counsel
John R. Arney, Jr.
Mary E. Groff
John W. Herron
Charles F. Lieberman
Jeffrey P. Paul
Thomas J. Shannon

November 20, 1973

Fred Lowenschuss, Esquire
Two Penn Center Plaza
15th & JFK Blvd.
Philadelphia, PA 19102

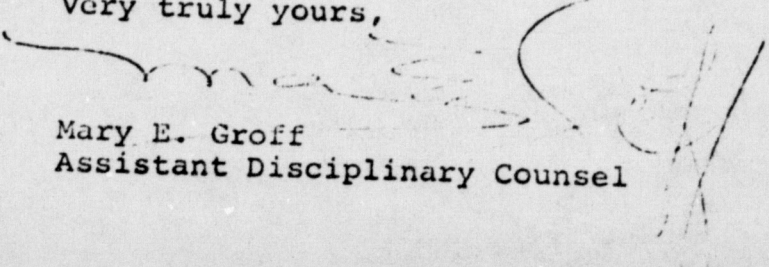
Dear Mr. Lowenschuss:

This office wrote to you on October 9, 1973 advising you that we had received a copy of the Honorable Kevin Thomas Duffy's Opinion in the case of Fred Lowenschuss Trustee of Fred Lowenschuss Associates Pension Plan et al against W. J. Kane et al, U.S. District Court, Southern District of New York - 73 Civil 2021. We requested that you furnish us with a copy of your Complaint in the action in order that we may evaluate Judge Duffy's comments in Foot Note 1 of the Opinion. You hand delivered to us a copy of the Complaint together with other papers including Affidavits and Memoranda of Law all of which had been filed of record in the case.

The investigation of Judge Duffy's complaint has now been completed. A recommendation of Assistant Disciplinary Counsel as to the disposition to be made in this matter was then forwarded to Chief Disciplinary Counsel for his review and recommendation. The file was in turn then referred to a Reviewing Member of a Hearing Committee for his review and final decision as to the disposition to be made. This procedure has now been completed and the final determination is that you have not been guilty of unprofessional conduct in violation of the Code of Professional Responsibility. This determination has been made known to Judge Duffy.

We are most appreciative of your cooperation in this matter.

Very truly yours,


Mary E. Groff
Assistant Disciplinary Counsel

PLAINTIFF'S NOTICE OF APPEAL DATED AUGUST 27, 1973
UNITED STATES DISTRICT COURT

136a

SOUTHERN DISTRICT OF NEW YORK

-----X
FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan,
individually and on behalf of all
other persons and shareholders of
Great Atlantic & Pacific Tea Co.,
Inc. who are similarly situated,

Plaintiff,

Civil Action No.
73 Civ. 2021 (KTD)

-against-

W.J. KANE, H.J. BERRY, R.M. BROWN, JR.,
W. CORBUS, D.K. DAVID, H.C. GILLESPIE,
J.S. KROH, E.A. LE PAGE, R.F. LONGACRE,
M.D. POTTS, J.M. SCHIFF, P.A. SMITH,
H. TAYLOR, JR., E.J. TONER, W.I. WALSH,
N.F. WHITTAKER, J.A. ZEIGLER (all of
whom are officers and directors of
Great Atlantic & Pacific Tea Co., Inc.)
and GREAT ATLANTIC & PACIFIC TEA CO.,
INC. and C.G. BLUHDORN and GULF &
WESTERN INDUSTRIES, INC. and KIDDER,
PEABODY & CO.,

Defendants.
-----X

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Fred Lowenschuss, et al., the
plaintiffs above named, hereby appeal to the United States
Court of Appeals for the ~~Second~~ Circuit from the decision dated
July 25, 1973, the final order to be entered thereon, granting
summary judgment in favor of the defendants against the plaintiffs
and the final order denying plaintiff's reargument of same entered

August 23, 1973.

Dated: New York, New York

ABRAHAM E. FREEDMAN

August 27, 1973

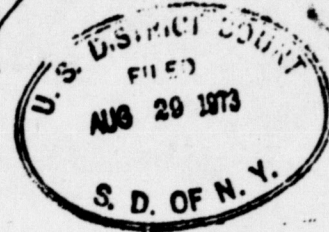
By Charles Saul
36 Seventh Avenue
New York, New York 10011

FRED LOWENSCHUSS ASSOCIATES

By Fred Lowenschuss
Two Penn Center Plaza
Philadelphia, Pennsylvania

ORDER TO SHOW CAUSE FOR A STAY DATED AUGUST 28, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates Pension Plan, individually and on behalf of all other persons and shareholders of Great Atlantic & Pacific Tea Co., Inc. who are similarly situated,

Plaintiff,

-against-

W.J. KANE, H.J. BERRY, R.M. BROWN, JR.,
W. CORBUS, D.K. DAVID, H.C. GILLESPIE,
J.S. KROH, E.A. LE PAGE, R.F. LONGACRE,
M.D. POTTS, J.M. SCHIFF, P.A. SMITH,
H. TAYLOR, JR., E.J. TONER, W.I. WALSH,
N.F. WHITTAKER, J.A. ZEIGLER (all of
whom are officers and directors of
Great Atlantic & Pacific Tea Co., Inc.)
and GREAT ATLANTIC & PACIFIC TEA CO.,
INC. and C.G. BLUHDORN and GULF &
WESTERN INDUSTRIES, INC. and KIDDER,
PEABODY & CO.,

Defendants.

Civil Action No.

73 Civ. 2021 (KTD)

ORDER TO SHOW CAUSE

TO
STAY AN ORDER OF
JUDGE DUFFY

WITH
A STAY

Upon the affidavit of Fred Lowenschuss duly verified the 27th day of August, 1973, the decision of Honorable Kevin T. Duffy, dated July 25, 1973; the proposed order to be entered thereon, the order of Honorable Kevin T. Duffy denying reargument dated August 23, 1973, the notice of appeal from all of the foregoing and the letter of Charles Sovel, Esq. to the attorneys for the defendants herein dated August 7, 1973 and on motion of Abraham E. Freedman attorney for the plaintiffs herein and upon notice to the other parties in this matter, it is

ORDERED, that the defendants show cause at a motion term of this Court, held in the United States Courthouse, Room 110, Borough of Manhattan, City and State of New York on the ~~28th~~ ^{5th} day of ~~August~~ ^{September} 1973 at ~~3:00~~ ^{3:00} p.m. in the afternoon of that day, or as soon thereafter as counsel can be heard why an order should not be made and entered herein staying that portion of the order of Honorable

For at such other time as Judge Duffy may fix

138a
Kevin T. Duffy dated August 23, 1973 which directs plaintiff to notify all members of the class of the Judge's decision of July 25, 1973 within the next five days after August 23, 1973; pending

appeal to the Circuit Court of said order and of the prior decision and proposed order based thereon and it is further

after hearing the suggestion of Mr. Wellis for certain defendants and Mr. Rich for Plaintiff
PPH
ORDERED that pending ~~determination~~ of the motion brought on by this Order to Show Cause ~~and the entry of an order thereon~~ good cause appearing therefore, that the portion of the aforesaid Order of the Honorable Kevin T. Duffy relating to the direction to the plaintiff to mail notice of his decision to members of the class dated August 23, 1973 be stayed.

Sufficient cause appearing therefor, that *PERSONAL* service of a copy of this Order, and the papers upon which it is based, upon the defendants by their attorneys as follows:

Messrs. Simpson, Thacher & Bartlett
Attorneys for Defendants, C.G. Bluhdorn
and Gulf & Western Industries, Inc.
One Battery Park Plaza
New York, New York 10005

Messrs. Sullivan & Cromwell
Attorneys for Defendant, Kidder, Peabody & Co.
48 Wall Street
New York, New York 10005

Messrs. Cahill, Gordon & Reindel
Attorneys for Defendant, Great Atlantic
& Pacific Tea Co., Inc.
80 Pine Street
New York, New York 10005

Messrs. Olwine, Connelly, Chase, O'Donnell
& Weyher
Attorneys for Defendants, Officers and
Directors of Great Atlantic & Pacific Tea Co., Inc.
299 Park Avenue
New York, New York 10017

PPH
before 3 o'clock on the 28 day of August, 1973 be deemed good and sufficient service thereof.

Dated: New York, New York

August 28 1973

ISSUED AT 2:50 PM.

J. Bluhdorn
U. S. D. J.

AFFIDAVIT OF JOHN A. GUZZETTA IN OPPOSITION TO MOTION
FOR A STAY DATED SEPTEMBER 4, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x
FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan,
individually and on behalf of all
other persons and shareholders of
Great Atlantic & Pacific Tea Co.,
Inc. who are similarly situated,

Plaintiff,

-against-

W.J. KANE, H.J. BERRY, R.M. BROWN, JR.,
W. CORBUS, D.K. DAVID, H.C. GILLESPIE,
J.S. KROH, E.A. LE PAGE, R.F. LONGACRE,
M.D. POTTS, J.M. SCHIFF, P.A. SMITH,
H. TAYLOR, JR., E.J. TONER, W.I. WALSH,
N.F. WHITTAKER, J.A. ZEIGLER (all of
whom are officers and directors of
Great Atlantic & Pacific Tea Co., Inc.)
and GREAT ATLANTIC & PACIFIC TEA CO.,
INC. and C.G. BLUHDORN and GULF &
WESTERN INDUSTRIES, INC. and KIDDER,
PEABODY & CO.,

Defendants.

----- x

AFFIDAVIT

Civil Action No.
73 Civ. 2021
(KTD)

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

JOHN A. GUZZETTA, being duly sworn, deposes and
says:

1. I make this affidavit in opposition to the
application by plaintiff for a stay of the Court's Order
directing plaintiff to notify all members of the class of
the Court's decision of July 25, 1973 and further to notify
said class that if any member of the class seeks a redeter-
mination of the matter that they may do so within 20 days.

2. The Court's Order which plaintiff seeks to stay
is contained in its Endorsement Memorandum of August 23, 1973.

3. Upon the return of plaintiff's Order to Show Cause on August 29, 1973 before the Honorable Inzer B. Wyatt, sitting as emergency judge, plaintiff stated that it was, as a physical matter, simply impossible to comply with the Court's Order of August 23, 1973. Judge Wyatt considered the application only from this perspective and confined it to a stay pending the availability of this Court to consider plaintiff's application. Considering statements made by plaintiff's counsel in Court, and the limitations imposed by Judge Wyatt on the application, I consented to a stay until September 5, 1973 at 3:00 P.M., at which time the matter will be brought to the attention of this Court, if indeed the Court is available on that date and at that time.

4. I point out in this affidavit only one matter which I think should be brought to the Court's attention and to which I alluded in my oral statement before Judge Wyatt on August 29, 1973.

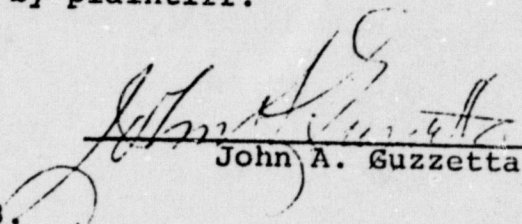
5. Shortly after the Court's decision of July 25, 1973 (within a matter of days) I received a telephone call from plaintiff's counsel, Mr. Charles Sovel, requesting a list of tendering shareholders in the G&W-A&P tender offer situation. I told him that neither I nor my firm had such a list and that the Vice President of Finance at Gulf & Western Industries, Inc., Mr. Neil J. Call, could direct him to the officer at Manufacturers Hanover Trust Company, the depository in this situation, who would be able to provide him with such a list. Within a day thereafter I was advised by Mr. Call that Mr. Sovel had made such a request and that he had told Mr. Sovel the name of the

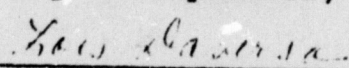
officer at the depository to whom to contact and that he 141a
had advised such person that he was authorized to provide
Mr. Sovel with such a list.

6. It was, therefore, with some surprise that I
learned on August 29, 1973 that despite the passage of over
a month, plaintiff had yet to obtain the list of tendering
shareholders. The physical impossibility to carry out the
Order of the Court which was relied on by plaintiff in the
final instance could, therefore, have easily been avoided.

7. In any event, on August 30, 1973 I received a
telephone call from Edward M. Katz, who is associated with
Mr. Sovel, representing plaintiff and who appeared at the
August 29, 1973 argument on behalf of plaintiff. Mr. Katz
told me that while there was no denial that Mr. Sovel had
made a request for such a list as I have stated, which request
was complied with by me and by Gulf & Western Industries,
Inc., they still did not have the information and again
needed the name of whom to get in touch with at the
depository. Again, I specified Mr. Call who has this
information and I, therefore, assume that, having the
capability of obtaining such a list, plaintiff now has it,
or can obtain it promptly, and that no reason exists
for their failure to inform/class as directed by this
Court, a class which all along plaintiff has argued he is
and should be representative of, but one which has yet to
be informed in the premises by plaintiff.

Sworn to before me this
4th day of September, 1973.


John A. Guzzetta


Notary Public

LOIS DAVERSA
Notary Public State of New York

JUDGE DUFFY

1 prm

2 FRED LOWENSCHUSS, et al,
3 Plaintiffs,

4 vs.

5 W. J. KANE, et al,
6 Defendants

73 Civ. 2021

DEC 4 12 10 PM '73
U.S. DISTRICT COURT
S.D. N.Y.

7 Before:

HON. KEVIN THOMAS DUFFY, D.J.

8 FOR THE PLAINTIFFS:

ABRAHAM E. FREEDMAN, ESQ.

36 Seventh Avenue

New York, New York 10011

By: CHARLES SOVEL, ESQ., of Counsel

9 FOR THE DEFENDANTS:

SIMPSON, THACHER & BARTLETT, ESQS.

1 Battery Park Plaza

New York, New York 10005

By: JOHN A. GUZZETTA, ESQ., of Counsel

11 ALSO PRESENT:

MESSRS. SULLIVAN & CROMWELL

48 Wall Street, New York, N.Y.

By: W. E. WILLIS, ESQ., of Counsel

13

September 5, 1973

14

4:30 p.m., Room 110

15

MR. SOVEL: Your Honor, my name is Charles Sovel.

16

I am here on behalf of the plaintiff.

17

18

18 THE COURT: This case is one with which I have a
19 certain familiarity, and the question at this point is what to
20 do in this particular case. You want a stay pending appeal,
21 is that correct?

22

MR. SOVEL: Yes, your Honor.

23

24

23 THE COURT: A stay of all the orders. We have
24 basically two orders, one originally entered on cross motions
25 for summary judgment. The second one of the motions for
rehearing, is that correct?

35

1 prm

2 MR. SOVEL: Not quite, your Honor. It is my under-
3 standing actually no order has as yet been entered on the ori-
4 ginal order for summary judgment. Our real objective here is
5 to put it in such a posture that we only have to give one notice.

6 THE COURT: How can we do that?

7 MR. SOVEL: There is, as your Honor is aware, the
8 section action pending in which there will be a question of
9 class determination also involved. There is pending the
10 motion to intervene in the original Gulf and Western, an A & P
11 action, in which if the motion were to be granted, there would
12 be a question of notice in that action as well. We would hope
13 the preliminary motions in class actions as to all litigation
14 could be determined first, one notice sent out to the class
15 as in all actions and then if the defendants are going to
16 proceed with their motion that can be determined and one
17 notice go out so we do not have to have a fragmented action,
18 an action that might involve several different appeals rather
19 than one appeal with all merits being considered at all time.
20 That is our basic objective here, your Honor.

21 THE COURT: You say that no order has been filed,
22 and yet according to the affidavit I see in front of me the
23 notice of appeal was filed with the Court of Appeals, Second
24 Circuit, Paragraph 19, I believe. You are appealing from
25 what?

1 prm

2 MR. SOVEL: From the order denying reargument
3 and the notice also said in order to be complete on the advice
4 of Mr. Fusaro of the Court of Appeals how to phrase it, of
5 any order perhaps to be entered on the original motion.
6 Technically speaking I think the only order entered was the
7 order directing us to give notice and that is really the
8 subject of the appeal and the order denying reargument although
9 we do not have an original order yet entered on the original
10 summary judgment motions.

11 THE COURT: I had thought an order was entered.
12 I will be very honest with you, I have more than enough work
13 to do and I can't swear that in every case I remember every-
14 thing that happens. Do you intend to appeal in Lowenschuss 1?

15 MR. SOVEL: Your Honor, if I may, just to clarify
16 your question for my own purposes here, if you mean if an
17 order is entered in Lowenschuss 1 do we intend to perfect an
18 appeal in that, the answer to that question is yes.

19 THE COURT: I think for purposes of completion of
20 this, I think an order has to be entered. So, you would
21 perfect the appeal and go up on that?

22 MR. SOVEL: Right.

23 THE COURT: At that point would you give notice
24 at all?

25 MR. SOVEL: If the order that was entered on

1 prn

4

2 Lowenschuss 1 only, without the determination of the other
3 motions and the other class actions in Lowenschuss 2, and
4 perhaps in the original Gulf and Western - an A & P action,
5 what we would seek to do would be to try to defer giving
6 notice until we can give one notice that will affect all
7 actions. We feel if we have to send out several notices,
8 there will be confusion, and we would hope that we could get
9 these procedural motions determined and then give the notice
10 and then we can go on to the merits perhaps of the amended
11 Lowenschuss 2 action and the other action, get one final order
12 entered and take an appeal from that if an appeal is warranted
13 at that time.

14 THE COURT: I'm not clear. Let me suggest that an
15 order is entered in Lowenschuss 1. You have notice of appeal
16 and that would be included in the notice of appeal and go up
17 and perfect that appeal. What you are asking for is a stay of
18 giving the notice until after you have your appeal and Lowen-
19 schuss 2 and the intervention is all wrapped up. But, you
20 would go ahead with the appeal.

21 MR. SOVEL: I think the proper procedure on the
22 appeal would be at that point, that we would move in the Court
23 of Appeals to defer the determination of the Lowenschuss 1
24 appeal in Lowenschuss 2 and the other matters are determined
25 in this Court so we'll only have to argue one appeal in that

1 prm

5

2 Court. I've been involved in appeals where that procedure has
3 been followed, until the remainder of the action is determined.

4 THE COURT: It is not quite the remainder of the
5 actions. It is chopped up. In other words, you would at that
6 point ask for a determination of class action, in Lowenschuss
7 2. and if you get the determination of class action, you would
8 have to go out and give notice. In connection with that you
9 would also give notice as to what happened in Lowenschuss 1?

10 MR. SOVEL: Yes.

11 THE COURT: Then I assume there is eventually
12 going to be a determination of Lowenschuss 2, at which point
13 what happens? Then you have to give another one.

14 MR. SOVEL: We would have to give another notice
15 but at that point if it is a final determination we might
16 proceed with the hearing if an appeal is warranted at that
17 time because you would have a final order that would be
18 reviewable in all actions.

19 THE COURT: I am not asking on --

20 MR. SOVEL: The answer is I might and might not.

21 THE COURT: I have discovered a long time ago
22 lawyers cannot walk on waters nor can they make prophecies.
23 I'm trying to get the mechanics clear in my mind. In other
24 words, what you are asking me to do right now is No. 1, enter
25 the order and No. 2, to stay the requirement to give notice

1 prm

6

2 on both the order already entered and the proposed order,
3 correct?

4 MR. SOVEL: Yes, your Honor.

5 THE COURT: Until such time you get a class
6 determination in Lowenschuss 2 if there is a class determina-
7 tion.

8 MR. SOVEL: Yes, sir.

9 THE COURT: How long is it going to take you to
10 move?

11 MR. SOVEL: Two weeks, three weeks the most. May
12 I make one point. The only thing that might present a road-
13 block there and I do not anticipate it at all, there might be
14 some questions of amending the complaint along the way but if
15 we agree on those matters it will go through.

16 THE COURT: Mr. Guzzetta.

17 MR. GUZZETTA: Several things, your Honor. No. 1,
18 the class in Lowenschuss 2 is different from the class in
19 Lowenschuss 1. Lowenschuss 1 --

20 THE COURT: Substantially.

21 MR. GUZZETTA: The stay that is being asked for
22 which is now articulated which is different than in the papers
23 have a very indefinite nature and puts the class in the
24 position where at least hypothetically they do not note at
25 least one action has been brought on their behalf and has been

1 prm

2 dismissed and an appeal is being taken and who knows whether
3 they will ever find out because of the indefinite nature of
4 the stay which is being requested. I might point out there is
5 probably going to be as a result of the formulation of the
6 actions by the plaintiff, a different kind of notice to the
7 different classes in order they may be properly informed and
8 not misinformed and confused.

9 THE COURT: I try to be as reasonable as I can.
10 I do not note the size of this class.

11 MR. SOVEL: About 1700.

12 THE COURT: Do you have a list?

13 MR. SOVEL: I do not have it in my possession.
14 It will be made available to me.

15 THE COURT: Who has got it?

16 MR. GUZZETTA: Manufacturers Hanover Trust has it,
17 as I said in my affidavit --

18 THE COURT: I do not have it.

19 MR. GUZZETTA: I'm sorry. I told Mr. Sovel a
20 month ago where to get it.

21 THE COURT: You will arrange with Manufacturers
22 Hanover to give it to --

23 MR. GUZZETTA: I have authorized Manufacturers
24 Hanover Trust Company to give Mr. Sovel a list, which is over
25 a month ago.

1 prm

2 THE COURT: I just want to know the mechanics.

3 MR. GUZZETTA: I can get it within a matter of
4 days, I'm told.

5 THE COURT: I do not know whether five days are
6 enough. How many days --

7 MR. SOVEL: Your Honor, my experience would be to
8 get the notice, get it reproduced, get the list and address and
9 I would say two weeks to get it out. I can probably get it
10 out in a week but I want to make sure the mailer has enough
11 time in working with the list.

12 THE COURT: I didn't expect the two of you to
13 come back with that. I figured five days but I did not know
14 how many people were involved. I am not deciding this motion.

15 MR. SOVEL: The classes defined in the Lowenschuss
16 2 action is different than the Lowenschuss 1. That is one of
17 the points we made. The argument was made, while we had
18 Lowenschuss 2, Lowenschuss 2 has a different class and we may
19 choose at this point, to amend the Lowenschuss 2 action to
20 define the same classes as Lowenschuss 2, and proceed only on
21 behalf of that class, and other than that we have been denied--

22 THE COURT: Is the class of Lowenschuss 2 larger
23 than Lowenschuss 1?

24 MR. SOVEL: I suspect smaller and it would not
25 encompass. It is not identical. I suspect the majority of

1 prm

2 Lowenschuss 2 class as he defined it in the section started in
3 Pennsylvania would be substantially different than the Lowen-
4 schuss 1 class. Lowenschuss 1 is those who tendered. Many
5 of those people held the stock for long periods of time prior
6 to the tender officers. Lowenschuss 2 is people who bought
7 after the offer was made.

8 THE COURT: You are at least contemplating at this
9 point an amendment of Lowenschuss 2, which will include at
10 least the class involved in Lowenschuss 1.

11 MR. SOVEL: Yes, sir.

12 THE COURT: You say it will take two weeks to get
13 to a posture where you make a motion.

14 MR. SOVEL: Yes, sir.

15 MR. GUZZETTA: I have seen lawyers do wonderful
16 things with their hands before but magic is usually outside
17 the realm of possibility. You cannot just determine in the
18 action that has been filed and called Lowenschuss 2 with the
19 claims that have been made under the Williams Act in 10B(5)
20 that the class all of a sudden ought to be coextensive with
21 the contract action. It is just not possible that be done so
22 the intention to amend is a charming act of prestidigitation
23 but doesn't work. It would require an entirely new formulation
24 of the claim. You would really have to have a whole new
25 complaint. I know the plaintiff hasn't been a bit hesitant in

1 prm

2 filing complaints and applications to intervene and one thing
3 and another but this one we require just another complaint.

4 THE COURT: Which is also possible.

5 MR. GUZZETTA: True. Within the state of
6 limitations he can file anything he wants.

7 THE COURT: That I'm not worried about.

8 MR. SOVEL: I would remind Mr. Guzzetta his whole
9 position was --

10 THE COURT: I'm not worried about that. Anyway,
11 this basically -- I'm sure that you have prepared long for
12 this argument but basically the relief involved in this motion
13 is mechanical. I think we'll all agree with that. Mr.
14 Guzzetta, I will let you have your say but I see there are
15 counsel here for other parties.

16 MR. GUZZETTA: his gentleman is Mr. Rubell, your
17 Honor. He is with me.

18 MR. WILLIS: My name is William Willis. I do not
19 propose to make any oral argument today.

20 MR. GUZZETTA: I would like to make one additional
21 observation and that is looking at this application from the
22 prospective of the class, the class ought to know, for example,
23 that an appeal is being taken so that they can determine in
24 accordance with what your Honor orders in the endorsement
25 memorandum or reargument of Lowenschuss to determine whether

1 prm

11

2 or not they want to apply to your Honor for reconsideration,
3 whether or not they want to, in effect, opt out and have them-
4 selves represented by other people. They ought to know at
5 some stage and it ought to be at an early stage, whether or
6 not they are going to go along with the class representation
7 represented by Mr. Lowenschuss, whether or not they are going
8 to come back to your Honor and ask for reconsideration,
9 whether or not to join in the appeal. These are matters they
10 ought to at least be advised of. As of this point despite the
11 fact that a list has been available for over a month --

12 MR. SOVEL: Your Honor, may I make one comment on
13 that?

14 THE COURT: Sure.

15 MR. SOVEL: I have no disagreement with the idea
16 that the class should be notified. If your Honor intends, as
17 I think your Honor suggested you might, proceed to in very
18 short order to enter the order in Lowenschuss 1, then the
19 appeal from the giving of notice would serve no purpose and
20 that would not be perfected, would not need to be because then
21 we would be proceeding from the order of the merits. At this
22 moment, we would proceed promptly with class determination on
23 all actions which would include the fact that we're prosecu-
24 ting an appeal from Lowenschuss 1 and it could also incorporate
25 the right before that appeal is prosecuted to come before your

1 prm

12

2 Honor if they wish to. We can cover that in one notice.

3 THE COURT: Do I presently have a motion pending
4 in class determination Lowenschuss 2?

5 MR. SOVEL: No.

6 THE COURT: The reason for oral argument as far
7 as I am concerned, gentlemen, is so I can sharpen in my own
8 mind what the issues are. I think I understand them at this
9 point. Particularly in view of the fact that I have never
10 seen, and I'm not complaining, Mr. Guzzetta or anybody else,
11 I have never seen the affidavit, I am not going to decide it
12 right now. It would be unfair to both sides. I would like
13 to give it some thought. Basically, Mr. Sovel, what you are
14 driving for is economy, not only for the individual
15 who represents the class in Lowenschuss 1 and purports to
16 represent the class in Lowenschuss 2, but also in absence of
17 what you think might raise confusion in the minds of the
18 members of the class. Is that correct?

19 MR. SOVEL: That is correct, your Honor.

20 THE COURT: Mr. Guzzetta's position is, in view
21 of the fact that we have had so much going on, let's get it
22 out right now, is that right?

23 MR. GUZZETTA: And that there are different
24 classes.

25 THE COURT: As I said, I am not going to decide

1 prn

2 it right now. Decision will be reserved. I do not expect it
3 will take very long.

4 MR. SOVEL: Your Honor, would it be any inter-
5 ference if I were to proceed promptly with the filing of the
6 motion in Lowenschuss 2 of the class determination so we can
7 get these matters before your Honor?

8 THE COURT: I think we ought to anyway. I would
9 like to get all these cases moving as fast as possible. I
10 assume that after the class determination is made there will
11 a number of motions back and forth by both sides. Let's do
12 it as fast as possible. I hope all of the attorneys involved
13 here are good enough to treat each other as the title of that
14 book, Brothers-In-Law, I hope they will say after you make a
15 motion for class determination I will make a motion for
16 summary judgment or make a motion to dismiss the complaint and
17 let's get the whole thing out on the table.

18 MR. GUZZETTA: I can advise my brother Sovel I am
19 going to file a motion to dismiss within a week.
20
21
22
23
24
25

ORDER OF DISTRICT COURT FILED SEPTEMBER 26, 1973
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

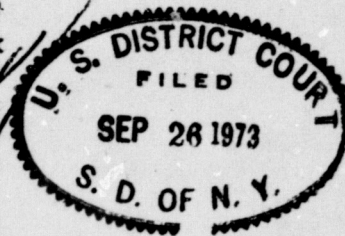
FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan,
individually and on behalf of all other
persons and shareholders of Great
Atlantic & Pacific Tea Co., Inc. who are
similarly situated,

Plaintiff,

against-

W. J. KANE, H. J. BERRY, R. M. BROWN,
JR., W. CORBUS, D. K. DAVID, H. C.
GILLESPIE, J. S. KROH, E. A. LE PAGE,
R. F. LONGACRE, M. D. POTTS, J. M.
SCHIFF, P. A. SMITH, H. TAYLOR, JR.,
E. J. TONER, W. I. WALSH, N. F.
WHITTAKER, J. A. ZEIGLER (all of whom
are officers and directors of Great
Atlantic & Pacific Tea Co., Inc.)
and GREAT ATLANTIC & PACIFIC TEA CO.,
INC. and C. G. BLUHDORN and GULF &
WESTERN INDUSTRIES, INC. and KIDDER,
PEABODY & CO.,

Defendants,



ORDER

73 Civ. 2021 (KTD)

MICROFILM

SEP 26 1973

Defendants, C. G. Bluhdorn ("Bluhdorn") and Gulf &
Western Industries, Inc. ("G&W"), having moved this Court
for an order pursuant to Rule 56 of the Federal Rules of
Civil Procedure, granting summary judgment as to it, and said
motion having been returned on the 3rd day of July, 1973, and
the briefs of the parties having been duly submitted and
fully considered by the Court, and an Opinion having been
rendered by the Court (the Honorable Kevin Thomas Duffy) on
the 25th day of July, 1973, and there being no just reason
for delay in the entry of judgment, it is hereby

ORDERED, ADJUDGED AND DECREED, that the Great Atlantic and Pacific Co., Inc. ("A&P") shareholders who tendered shares in accordance with G&W's invitation for tenders dated February 1, 1973, be, and hereby are, designated as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure for purposes of this action; and, that Fred Lowenschuss be, and hereby is, declared to be a fair and adequate representative of this class; and it is further

ORDERED, ADJUDGED AND DECREED, that Summary Judgment be, and hereby is, granted in favor of defendants C. G. Bluhdorn, G&W, and Kidder, Peabody & Co., Inc. ("Kidder, Peabody"), and against all plaintiffs herein, with prejudice; and it is further

ORDERED, ADJUDGED AND DECREED, that defendants C. G. Bluhdorn, G&W and Kidder, Peabody have judgment against all plaintiffs dismissing all counts of the complaint against said defendants, with costs; and it is further

ORDERED, ADJUDGED AND DECREED, that plaintiff Fred Lowenschuss notify the members of the class of tendering A&P shareholders of this Order and of their presently existing rights, using a form of notice as appears in the attached Exhibit A.

Dated: New York, New York
August 13, 1973

Frederick Thomas Duffy
U. S. D. J.

JUDGMENT ENTERED SEP 26 1973

Raymond F. Burkhardt
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
FRED LOWENSCHUSS, Trustee for Fred :
Lowenschuss Associates Pension Plan, :
individually and on behalf of all :
other persons and shareholders of :
Great Atlantic & Pacific Tea Co., :
Inc. who are similarly situated, :
:
Plaintiff, :

-against-

W. J. KANE, H. J. BERRY, R. M. BROWN, :
JR., W. CORBUS, D. K. DAVID, H. C. :
GILLESPIE, J. S. KROH, E. A. LE PAGE, :
R. F. LONGACRE, M. D. POTTS, J. M. :
SCHIFF, P. A. SMITH, H. TAYLOR, JR., :
E. J. TONER, W. I. WALSH, N. F. :
WHITTAKER, J. A. ZEIGLER (all of whom :
are officers and directors of Great :
Atlantic & Pacific Tea Co., Inc.) :
and GREAT ATLANTIC & PACIFIC TEA CO., :
INC. and C. G. BLUHDORN and GULF & :
WESTERN INDUSTRIES, INC. and KIDDER, :
PEABODY & CO., :

Defendants. :
:
-----x

NOTICE TO ALL A&P
SHAREHOLDERS WHO
TENDERED SHARES
TO G&W

73 Civ. 2021 (KTD)

This is to advise you that the United States District Court for the Southern District of New York has determined that the above-captioned lawsuit was properly instituted as a Class Action and has granted summary judgment in favor of defendants C. G. Bluhdorn ("Bluhdorn"), Gulf & Western Industries, Inc. ("G&W"), and Kidder, Peabody & Co. ("Kidder, Peabody"). By a stipulated consent defendants W. J. Kane, et al. ("A&P's Board") and Great Atlantic and Pacific Tea Co., Inc. ("A&P") have been withdrawn from the action, without prejudice to a later renewal of claims.

The class that plaintiff Fred Lowenschuss ("Lowenschuss") has been held to represent, all A&P shareholders who tendered shares pursuant to G&W's tender offer of

February 1, 1973, may include you. Accordingly, your rights may be affected by the lawsuit and its results.

The Court's opinion is restricted to contract claims based on G&W's offer. It reasons that the preliminary injunction enjoining G&W from purchasing the tendered shares rendered any "contract" between G&W and the tendering shareholders "impossible" of performance and excused both sides of obligations under it. Furthermore, since the likelihood of an injunction being issued was known to all parties during the offer's pendency and since G&W cannot be said to have brought the injunction upon itself, G&W should not be asked to bear the burden of plaintiffs' lost expectations. You are referred to the opinion itself for details. The opinion is available for inspection and copying upon personal request to the undersigned Clerk.

Rule 23 of the Federal Rules of Civil Procedure provides for procedures for voluntary exclusion from the class and for individual representation by counsel other than Fred Lowenschuss, who has been judicially determined to be a fair and adequate representative of the class. You are referred to this rule for the mechanics of these procedures.

You are hereby, advised that this notice to you as a tendering A&P shareholder supersedes any and all prior notices which you may have received.

Dated: New York, New York
August , 1973

Clerk
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007
(212) 483-9000

PLAINTIFF'S NOTICE OF APPEAL DATED OCTOBER 5, 1973
 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

-----X
 FRED LOWENSCHUSS, Trustee for Fred
 Lowenschuss Associates Pension Plan,
 individually and on behalf of all
 other persons and shareholders of
 Great Atlantic & Pacific Tea Co., Inc.
 who are similarly situated,

Plaintiff,

--Against--

Civil Action No.
 73 Civ. 2021 (KTD)

W.K. KANE, H.J. BERRY, R.M. BROWN, JR.,
 W. CORBUS, D.K. DAVID, H.C. GILLESPIE,
 J.S. KROH, E.A. LE PAGE, R.F. LONGACRE,
 M.D. POTTS, J.M. SCHIFF, P.A. SMITH,
 H. TAYLOR, JR., E.J. TONER, W.I. WALSH,
 N.F. WHITTAKER, J.A. ZEIGLER (all of whom
 are officers and directors of Great
 Atlantic & Pacific Tea Co., Inc.) and
 GREAT ATLANTIC & PACIFIC TEA CO., INC.
 and C.G. BLUHDORN and GULF & WESTERN IN-
 DUSTRIES, INC. and KIDDER, PEABODY & CO.,

Defendants.
 -----X

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Fred Lowenschuss, et al, the
 plaintiffs above named, hereby appeal to the United States Court
 of Appeals for the Second Circuit from each and every part of the
 decision and judgment entered in the above captioned matter on
 September 26, 1973.

PLEASE TAKE FURTHER NOTICE that Fred Lowenschuss, et al, the plaintiffs above named, hereby renew their appeal to the United States Court of Appeals for the Second Circuit from the order of this Court dated August 23, 1973 denying plaintiffs' motion for reargument.

Dated: New York, New York
October 5, 1973

ABRAHAM E. FREEDMAN

By Charles Seal
36 Seventh Avenue
New York, New York 10011

FRED LOWENSCHUSS ASSOCIATES

By Fred Lowenschuss
Two Penn Center Plaza
Philadelphia, Pennsylvania

TO: Messrs. Simpson, Thacher & Bartlett
Attorneys for Defendants, C.G. Bluhdorn
and Gulf & Western Industries, Inc.
One Battery Park Plaza
New York, New York 10005

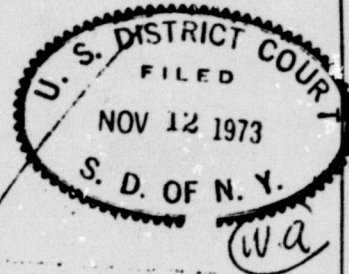
Messrs. Sullivan & Cromwell
Attorneys for Defendant, Kidder, Peabody & Co.
48 Wall Street
New York, New York 10005

Messrs. Cahill, Gordon & Reindel
Attorneys for Defendant, Great Atlantic
& Pacific Tea Co., Inc.
80 Pine Street
New York, New York 10005

Messrs. Olwine, Connelly, Chase,
O'Donnell & Weyher
Attorneys for Defendants, Officers and
Directors of Great Atlantic & Pacific
Tea Co., Inc.
299 Park Avenue
New York, New York 10017

ORDER OF DISTRICT COURT FILED NOVEMBER 12, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----x
FRED LOWENSCHUSS, Trustee for Fred :
Lowenschuss Associates Pension Plan, :
individually and on behalf of all :
other persons and shareholders of :
Great Atlantic & Pacific Tea Co., :
Inc. who are similarly situated, :

Plaintiff, :

-against- :

W. J. KANE, H. J. BERRY, R. M. :
BROWN, JR., W. CORBUS, D. K. DAVID, :
H. C. GILLESPIE, J. S. KROH, E. A. :
LE PAGE, R. F. LONGACRE, M. D. :
POTTS, J. M. SCHIFF, P. A. SMITH, :
H. TAYLOR, JR., E. J. TONER, W. I. :
WALSH, N. F. WHITTAKER, J. A. :
ZEIGLER (all of whom are officers :
and directors of Great Atlantic :
& Pacific Tea Co., Inc.) and :
GREAT ATLANTIC & PACIFIC TEA CO., :
INC. and C. G. BLUHDORN and GULF :
& WESTERN INDUSTRIES, INC. and :
KIDDER, PEABODY & CO., :

ORDER

73 Civ.
2021 (KTD)

MICROFILM
NOV 12 1973

Defendants.:
-----x

Defendants, C. G. Bluhdorn ("Bluhdorn") and Gulf & Western Industries, Inc. ("G&W"), having moved this Court for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment as to it, and plaintiffs having cross-moved for a summary judgment and said motions having been returned on the 3rd day of July, 1973, and the briefs of the parties having been duly submitted and fully considered by the Court, and an Opinion having been rendered by the Court (the Honorable Kevin Thomas Duffy) on the 25th day of July, 1973, and plaintiffs' motion for reargument having been denied in an endorsement and order filed August 23, 1973 and there being no just reason for

delay in the entry of judgment, except to the extent herein-after set forth, it is hereby

ORDERED, ADJUDGED AND DECREED, that the Great Atlantic and Pacific Tea Co., Inc. ("A&P") shareholders who tendered shares in accordance with G&W's invitation for tenders dated February 1, 1973, be, and hereby are, designated as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure for purposes of this action; and, that Fred Lowenschuss be, as Trustee for Fred Lowenschuss Associates Pension Plan, and hereby is, declared to be a fair and adequate representative of this class; and it is further

ORDERED, ADJUDGED AND DECREED, that plaintiff Fred Lowenschuss notify the members of the class of tendering A&P shareholders of this Order and of their presently existing rights, by first class mail to be completed by December 21, 1973, using a form of notice as appears in the attached Exhibit A, which notification shall state that if any member of the class seeks a redetermination of this matter, such member may do so by serving upon the remaining parties hereto and filing with the Court any briefs, affidavits and other material showing why the decision rendered herein is not proper by January 18, 197⁴~~7~~, and it is further

ORDERED, ADJUDGED AND DECREED, that this Order shall, upon the expiration of 15 days following the date for receipt of briefs, etc. specified in the foregoing paragraph unless otherwise ordered, constitute a final order and judgment ordering, adjudging and decreeing

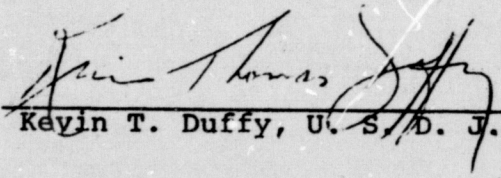
(a) that summary judgment be, and hereby is granted in favor of defendants C. G. Bluhdorn, G&W

and Kidder, Peabody & Co., Inc. ("Kidder, Peabody"), and against all plaintiffs herein, with prejudice; and

(b) that defendants C. G. Bluhdorn, G&W and Kidler, Peabody have judgment against all plaintiffs dismissing all counts of the complaint against said defendants, with costs; and

(c) that the motion of plaintiff for summary judgment is denied.

Dated: New York, New York
November 9, 1973


Kevin T. Duffy, U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

FRED LOWENSCHUSS, Trustee for Fred :
Lowenschuss Associates Pension Plan, :
individually and on behalf of all :
other persons and shareholders of :
Great Atlantic & Pacific Tea Co., :
Inc. who are similarly situated, :
Plaintiff, :

-against-

W.J. KANE, H.J. BERRY, R.M. BROWN, JR., :
W. CORBUS, D.K. DAVID, H.C. GILLESPIE, :
J.S. KROH, E.A. LE PAGE, R.F. LONGACRE, :
M.D. POTTS, J.M. SCHIFF, P.A. SMITH, :
H. TAYLOR, JR., E.J. TONER, W.I. WALSH, :
N.F. WHITTAKER, J.A. ZEIGLER (all of :
whom are officers and directors of :
Great Atlantic & Pacific Tea Co., Inc.) :
and GREAT ATLANTIC & PACIFIC TEA CO., :
INC. and C.G. BLUHDORN and GULF & :
WESTERN INDUSTRIES, INC. and KIDDER, :
PEABODY & CO., :

Defendants. :

NOTICE OF ALL A&P :
SHAREHOLDERS WHO :
TENDERED SHARES :
TO G&W

:73 Civ. 2021 (KTD)

-----X

This is to advise you that the United States District Court for the Southern District of New York has determined that the above-captioned lawsuit was properly instituted as a Class Action and has rendered a decision requiring the grant of summary judgment in favor of defendants C. G. Bluhdorn ("Bluhdorn"), Gulf & Western Industries, Inc. ("G&W"), and Kidder, Peabody & Co. ("Kidder, Peabody"). By a stipulated consent between plaintiffs and defendants W. J. Kane, et al. ("A&P's Board") and The Great Atlantic & Pacific Tea Co., Inc. ("A&P"), and Court Order pursuant thereto, the action against A&P's Board and A&P has been dismissed.

The class that plaintiff Fred Lowenschuss ("Lowenschuss") has been held to represent, all A&P shareholders who tendered shares pursuant to G&W's tender offer

of February 1, 1973, may include you. Accordingly, your rights may be affected by the lawsuit and its results.

The Court's opinion is restricted to alleged contract claims for damages and specific performance. It reasons that, even assuming that there was a "contract" between G&W and persons who tendered A&P shares, the Court's own preliminary injunction, which enjoined G&W from purchasing such shares, rendered impossible the performance of any such "contract" and thus excused both sides from the obligations under it, that there is a condition implicit in every tender offer to the effect that its consummation not be enjoined; that the threat and existence of litigation and thus the possibility of an injunction being issued was clear early in the offer's pendency; that G&W could not be said to have brought the injunction upon itself but rather had vigorously opposed it; and that the alleged antitrust questions sufficient to preclude consummation of the tender offer were not the fault of any party, but rather rested upon a juxtaposition of economic facts. You are referred to the opinion of this Court, which is available for inspection and copying upon personal request to this undersigned clerk, for details.

The plaintiff has indicated that it will appeal the decision of the Court. Any judgment rendered herein, favorable or adverse, will bind those members of the class who do not request to be excluded. Exclusion may be requested by writing to the undersigned clerk, postmarked prior to , 1973 referring to the name and number of this case and stating the name, address and the number of A&P shares tendered by the person requesting exclusion.

Any member of the class who does not request exclusion may enter an appearance through his own counsel; otherwise his interest will be represented without cost by plaintiff, who has been judicially deemed to be a fair and adequate representative of the class.

In addition, pursuant to court order, any member of the class who wishes to do so may apply for a redetermination of the Court's ruling by filing any briefs and affidavits it wishes to present with the Court and serve the same upon Abraham E. Freedman, 36 Seventh Avenue, New York, N.Y. 10011; Sullivan and Cromwell, 48 Wall Street, New York, N.Y. 10005; and Simpson Thacher & Bartlett, One Battery Park Plaza, New York, N.Y. 10004 on or before

, 1973. Unless otherwise ordered by the Court upon consideration of such an application, its decision rendering summary judgment in favor of the aforesaid defendants will become a final judgment and order upon the expiration of 15 days following the aforesaid date.

You are hereby advised that this notice to you as a tendering A&P shareholder supersedes any and all prior notices which you may have received from any source.

Dated: New York, New York
 , 1973

Clerk
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007
(212) 264-6531

ORDER TO SHOW CAUSE TO VACATE ORDER AND SUPPORTING
 AFFIDAVIT OF CHARLES SOVEL DATED NOVEMBER 28, 1973
 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

-----X
 FRED LOWENSCHUSS, Trustee for Fred :
 Lowenschuss Associates Pension Plan, :
 Individually and on behalf of all :
 other persons and shareholders of :
 Great Atlantic & Pacific Tea Co., :
 Inc. who are similarly situated, :

Plaintiff, :

-Against-

W. J. KANE, H. J. BERRY, Etc., :

Defendants. :
 -----X

ORDER TO SHOW CAUSE
 TO VACATE ORDER
 73 Civ. 2021

WITH A STAY

Upn the annexed affidavit of Charles Sovel, sworn to
 the 20th day of November, 1973, and all the prior proceedings had
 herein, ~~let~~ *IT IS HEREDY ORDERED THAT THE* defendants show cause before this Court on the day
 of , 1973 in Room of the United States Courthouse,
 Foley Square, New York, New York at . M, or as soon thereafter
 as counsel may be heard, why an order should not be entered pur-
 suant to Rule 60 of the Federal Rules of Civil Procedure ~~striking~~ *VACATING*
 the order entered by this Court on November 12, 1973 and granting
 such other and further relief as may be just and proper in the
 circumstances, *IT IS FURTHER ORDERED THAT PERSONAL*

~~Sufficient cause appearing therefore, let~~ service of a
 copy of this order and all the papers on which it is based, upon
 Messrs. Simpson, Thacher & Bartlett, One Battery Park Plaza, New
 York, New York, attorneys for defendants C. G. Bluhdorn and Gulf &
 Western Industries, Inc., and Messrs. Sullivan & Cromwell, 48 Wall
 Street, New York, New York 10005, attorneys for defendant Kidder,

Peabody & Co. on or before O'clock, November , 1973, be
deemed good and sufficient service of this order, and in the mean-
time and until the hearing and determination of this motion and
the entry of an order thereon, ^{IT IS FURTHER ORDERED THAT} ~~let all~~ proceedings required by
this Court's order of November 12, 1973 be stayed.

Dated: New York, New York
November , 1973.

Issued at

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan,
Individually and on behalf of all
other persons and shareholders of
Great Atlantic & Pacific Tea Co.,
Inc. who are similarly situated,

Plaintiff,

AFFIDAVIT

-Against-

73 Civ. 2021

W. J. KANE, H. J. BERRY, Etc.

Defendants.
-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK)

ss:

Charles Sovel, being duly sworn, deposes and says:

1. I am a member of the firm of Abraham E. Freedman, co-counsel for plaintiff in the within action. I submit this affidavit in support of plaintiff's motion pursuant to Rule 60 of the Federal Rules of Civil Procedure for an order striking the order entered by this Court on November 12, 1973. I am personally familiar with the matters herein stated.

2. On September 26, 1973, this Court entered a final order in this matter granting summary judgment in favor of defendants and against the plaintiff. On October 5, 1973, plaintiff served and filed a Notice of Appeal from the order entered on September 26, 1973. A copy of this Notice of Appeal is annexed hereto as Exhibit A. On October 11, 1973 the record in this case was transmitted and filed in the United States Court of Appeals for

the Second Circuit.

170a

3. On November 12, 1973, notwithstanding the pendency of the appeal and the transmittal of the record to the Court of Appeals, this Court entered a new order covering the same subject matter involved in the appeal. A copy of this Court's order of November 12, 1973 is annexed hereto as Exhibit B.

4. Under well established authority, the filing of a Notice of Appeal "has the effect of immediately transferring jurisdiction from the District Court to the Court of Appeals with respect to any matters involved in the appeal" and "divests the District Court of authority to proceed further with respect to such matters." See 9 Moore's Federal Practice ¶203.11 (page 734), and cases cited therein. In the instant case, not only was a valid Notice of Appeal filed from a final order, but the record actually had been transmitted to the Court of Appeals prior to the entry of the order of November 12, 1973. Accordingly, the order of November 12, 1973 was entered at a time when this Court lacked jurisdiction and therefore should be stricken.

5. Plaintiff seeks to bring this matter on before the Court by Order to Show Cause because it is urgent that the matter be resolved quickly as there is disagreement among the parties as to which orders are properly the subject of the appeal at this time.

171a

WHEREFORE, deponent respectfully prays the Court to
grant this Order to Show Cause and to enter an order striking the
order entered on November 12, 1973.

*No previous application for such relief having been
made.*

Charles Sovel
Charles Sovel

Sworn to before me this

28th day of November, 1973.

Christine Smith

CHRISTINE SMITH
Notary Public, State of New York
No. 03-4502829
Qualified in Bronx County
Term Expires March 30, 1975

AFFIDAVIT OF JOHN A. GUZZETTA IN OPPOSITION TO MOTION
TO VACATE ORDER DATED NOVEMBER 30, 1973
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

| | | |
|--------------------------------------|---|------------------|
| FRED LOWENSCHUSS, Trustee for Fred | : | |
| Lowenschuss Associates Pension Plan, | : | |
| Individually and on behalf of all | : | |
| other persons and shareholders of | : | |
| Great Atlantic & Pacific Tea Co., | : | |
| Inc. who are similarly situated, | : | |
| | : | |
| Plaintiff, | : | <u>AFFIDAVIT</u> |
| | : | |
| -against- | : | 73 Civ. 2021 |
| | : | (K.T.D.) |
| W. J. KANE, H. J. BERRY, etc., | : | |
| | : | |
| Defendants. | : | |
| | : | |
| ----- | : | x |

JOHN A. GUZZETTA, being duly sworn, deposes and says:

1. I am a member of the firm of Simpson Thacher & Bartlett, counsel for defendants Gulf & Western Industries Inc. ("G&W") and Charles G. Bluhdorn in this action. I submit this affidavit in opposition to plaintiff's motion pursuant to Rule 60 F.R.C.P. to strike the Court's order of November 12, 1973. I am personally familiar with the facts herein set forth.

2. Plaintiff's motion is based entirely upon his supposed appeal from an order of this Court dated August 13, 1973 and entered on September 26, 1973. That supposed appeal is improper and we believe that it may be wholly disregarded, since the paper appealed from is at best a non-final order, if not merely a nullity.

3. The paper purportedly appealed from is the order which had been submitted by our firm after Your Honor's original decision on July 25, 1973 and was designed

173a

to embody that decision. Notice of Settlement was served upon plaintiff's counsel and filed with the Court on August 2, 1973. According to a letter of plaintiff's counsel to other counsel dated August 7, 1973, the Court agreed, at his request, to withhold action respecting such order until 5 days following the disposition of plaintiff's then proposed motion for reargument. Accordingly, while the order bears a signature date of August 13, 1973, it was not entered or filed at that time.

4. Before that order had any legal effect -- since it had not been entered (see General Rule 10 of this Court) and indeed counsel were unaware that it had been signed -- this Court issued an Endorsement and Order dated August 23, 1973 at the instance of plaintiff's motion for reargument. In that order, the Court modified its decision of July 25, 1973 so as to defer any final determination in this action pending possible applications by shareholders after proper notice had been given to them of the Court's proposed disposition.

5. On September 26, 1973, after the original decision had been so modified, a number of other orders relating to matters in the original litigation between G&W and A&P (73 Civ. 536) were signed and entered, viz:

(a) an order dismissing as moot the application of a third-party witness for a protective order;

(b) an order dismissing the action in accordance with the stipulation of the parties;

(c) an order denying Mr. Lowenschuss' motion to intervene;

(d) an order denying Mr. Lowenschuss' motion for consolidation.

On the same date, and we assume either by inadvertence or on a nunc pro tunc basis, the outdated and superseded order relating to the original decision found its way to the Clerk's office and was entered.

174a

6. That piece of paper obviously did not become a "final order" in this case. Indeed, even before it had any legal existence it had already been modified by the August 23, 1973 order. Thus it must be deemed either entered-as-modified (in which case it is not a final order since it permits a redetermination upon shareholder application), or of no effect. To take an appeal on the basis that the September 26, 1973 order constitutes a "final order" of this Court is merely to misrepresent the course of events. Indeed, had plaintiff not requested that the Court defer action on our proposed order, he would not now be able to sponsor the illusion that its entry on September 26, 1973 (although signed on August 13, 1973) was meant to displace the modification of August 23, 1973.

7. Plaintiff's participation in the error on which he now relies upon goes even further. It will be recalled that at a hearing on September 5, 1973, the Court made an inquiry as to the fate of an order which it believed to have signed following the original decision. Counsel for the parties indicated no awareness of such an order. Then, by letter dated September 12, plaintiff circulated a new form of proposed order. We circulated a counter-proposal by letter dated October 3, 1973. Unaware that the original order had been entered on September 26, 1973,* we stated in our letter in part as follows:

* I am now informed that the order mistakenly appeared under Judge Carter's name in the New York Law Journal on September 28, 1973.

"Your Honor will recall that there was some confusion expressed during the parties' appearance in Court as to whether an order reflecting your Honor's decision of July 25, 1973 had been signed. We have reviewed our files and find a letter dated August 7, 1973 from Charles Sovel, Esq. to counsel in these actions advising us that on his request the Court had agreed to defer action on the proposed order until five days after a disposition of plaintiff's motion for reargument. Accordingly, we suspect that whether or not signed, no order was entered. . ."

8. Apparently, plaintiff became aware that the original order had in fact been entered on September 26, 1973. Rather than taking corrective action --notwithstanding our letter -- plaintiff simply took advantage of the error and filed a notice of appeal dated October 5, 1973, and now seeks to use that appeal to oust the Court of jurisdiction.

9. We respectfully submit that a defective, non-final order cannot be used to affect this Court's jurisdiction to carry out the intent and purpose of the order of August 23, 1973. Such intent and purpose has been particularized in the Court's order of November 12, 1973. Because Rule 60 is designed to cure errors in orders and judgments, and not to perpetuate such errors, we submit that plaintiff's motion should be denied. If plaintiff does not voluntarily withdraw the defective appeal he has undertaken, we would propose to move to dismiss it.

Sworn to before me this (30th day of November 1973.

Mary L. Frohley
Notary Public

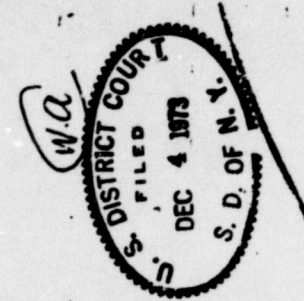
MARY E. TRABULSY
Notary Public, State of New York
No. 24-4510794
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

MEMORANDUM ENDORSEMENT OF DISTRICT COURT FILED
DECEMBER 4, 1973

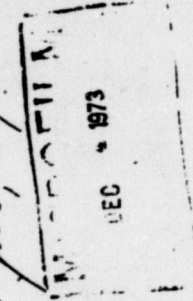
176a

The order to show cause proposed herein is to be considered as a motion and as such argument was heard from both parties. The majority proposed order may be filed & proposed. So ordered.

Lin. Thomas



*Nov 29, 1973
The judge, J.Y.*



Index No. Civ. 2021 Year 1973
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED LOWENSCHUSS, et al.,

Plaintiff,

-Against-

W.J. KANE, H.J. BERRY, et al.,

Defendants.

ORDER TO SHOW CAUSE
AND
AFFIDAVIT

ABRAHAM E. FREEDMAN

Attorney for PLAINTIFF

Office and Post Office Address, Telephone
346 WEST 17TH STREET
NEW YORK, N. Y. 10011
929-8410

To

Attorney(s) for

Service of a copy of the within

is hereby advised.

Dated,

Attorney(s) for Defendant(s)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the within is a (certified) copy of a document filed in the office of the clerk of the within court on 1973

Filed, New York, New York

Yours, etc.,

ABRAHAM E. FREEDMAN

Attorney for

Office and Post Office Address
346 WEST 17TH STREET
NEW YORK, N. Y. 10011
929-8410

Attorney(s) for

Service of a copy of the within

is hereby advised that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 1973

M.

Dated, New York, New York

Yours, etc.,

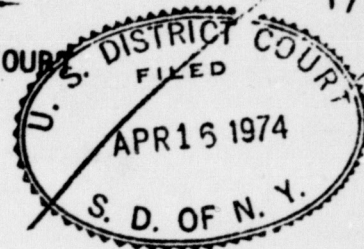
for

Office and Post Office Address
346 WEST 17TH STREET
NEW YORK, N. Y. 10011
929-8410

Attorney(s) for

14
7
MEMORANDUM AND ORDER OF DISTRICT COURT
FILED APRIL 16, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
FRED LOWENSCHUSS, Trustee for
Fred Lowenschuss Associates Pension
Plan, Individually and on behalf of
all other persons and shareholders
of Great Atlantic & Pacific Tea Co.,
Inc. who are similarly situated,

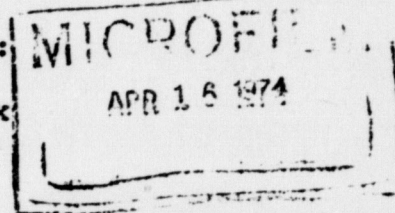
Plaintiff,

-against-

W. J. KANE, H. J. BERRY, Etc.,

Defendants.
-----X

MEMORANDUM AND ORDER
73 Civ. 2021



KEVIN THOMAS DUFFY, D.J.

Plaintiff has moved under Rule 60b of the Federal Rules of Civil Procedure for an order vacating a prior order of this Court which had been entered on November 12, 1973. The sole argument advanced by the plaintiff in support of his motion is that at the time I entered the order of November 12, 1973, I did not have jurisdiction to do so. Plaintiff contends that his appeal from an order filed in this case on September 26, 1973, had divested this Court of jurisdiction.

The defendants Gulf & Western Industries and Charles G. Bluhdorn oppose the vacation of the November 12th order and argue that the "supposed appeal [was] improper and we believe that it may be wholly disregarded, since the paper

appealed from is at best a non-final order, if not merely a nullity." Aff. of John Guzzetta ¶2 (filed November 30, 1973). The Court of Appeals for the Second Circuit agreed with this contention and on January 8, 1974 granted a motion to dismiss the appeal or, in the alternative, to summarily affirm the order appealed from.

Though the Second Circuit found that the attempted appeal was inappropriate, it did not directly address itself to the question presented by this motion, that is, whether at the time I entered the order of November 12, 1973, I had the jurisdiction to do so.

The general rule is, as plaintiff contends, that the filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals and divests the district court of authority to proceed further with such matters, except in aid of the appeal. 9 J. Moore, Federal Practice ¶203.11, at 734 (2d ed. 1973). However, as Professor Moore states in his treatise, "[t]he rule that the taking of an appeal divests the district court of jurisdiction would seem to presuppose the taking of a valid appeal from an appealable order." Id. at 736 (emphasis added). In this case the Second Circuit has, in effect, already decided that the appeal was not a valid appeal from an appealable order. Thus, since

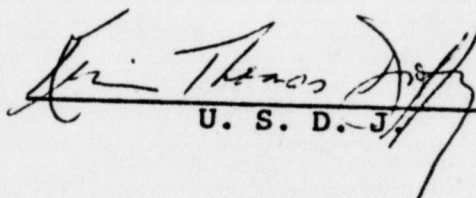
the purported appeal was invalid the mere act of filing that appeal did not divest me of jurisdiction. Again quoting Professor Moore:

"[t]o hold that the mere act of filing of a notice of appeal automatically divests the district court of jurisdiction is to hold that a party can interrupt proceedings in the district court at will. Whenever, then, an attempted appeal is manifestly ineffective to invoke the jurisdiction of the court of appeals, the district court should be free to proceed as though no appeal has been taken, which is the fact." Id. at 738.

See Ruby v. Secretary of United States Navy, 365 F.2d 385, 389 (9th Cir. 1966); Euziere v. United States, 266 F.2d 88 (10th Cir. 1959), vacated on other grounds, 364 U.S. 282 (1960); Smith v. Insurance Co. of No. Amer., 213 F. Supp. 675, 680 (M.D.Tenn. 1962).

Since I find that the purported appeal from the September 26, 1973 order was "manifestly ineffective", I was never divested of jurisdiction and the order of November 12, 1973 was validly entered. Plaintiff's motion to vacate the November 12 order is therefore denied in all respects.

SO ORDERED.


U. S. D. J.

Dated: New York, New York
April 15, 1974.

NOTICE OF APPEAL DATED OCTOBER 25, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

GULF & WESTERN INDUSTRIES, INC.,

Plaintiff,

-against- 73 Civil 536 (KTD)

THE GREAT ATLANTIC & PACIFIC
TEA CO., INC.,

Defendant and Third
Party Plaintiff,

-against- NOTICE OF APPEAL

CHARLES G. BLUHDORN and KIDDER,
PEABODY & CO., INC.

Third Party Defendants,

-----X

PLEASE TAKE NOTICE that Fred Lowenschuss, et al. hereby
appeals to the United States Court of Appeals for the Second Cir-
cuit from the order of this Court dated September 26, 1973 dis-
missing his motion to intervene in the within action and from
the order of this Court dated September 26, 1973 approving
settlement and dismissal of the within action.
Dated: New York, New York ABRAHAM E. FREEDMAN
October 25, 1973

By Charles E. Loref
36 Seventh Avenue
New York, New York 10011

FRED LOWENSCHUSS ASSOCIATES

By Fred Lowenschuss
Two Penn Center Plaza
Philadelphia, Pennsylvania

TO: Messrs. Simpson, Thacher & Bartlett
Attorneys for Defendants, C.G. Bluhdorn
and Gulf & Western Industries, Inc.
One Batter Park Plaza
New York, New York 10005

Messrs. Sullivan & Cromwell
Attorneys for Defendant, Kidder, Peabody & Co.
48 Wall Street
New York, New York 10005

Messrs. Cahill, Gordon & Reindel
Attorneys for Defendant, Great Atlantic
& Pacific Tea Co., Inc.
80 Pine Street
New York, New York 10005

Messrs. Olwine, Connelly, Chase
O'Donnell & Weyher
Attorneys for Defendants, Officers and
Directors of Great Atlantic & Pacific
Tea Co., Inc.
299 Park Avenue
New York, New York 10017

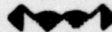
B 31

73-2300
73-2600

ORDER OF UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT DATED JANUARY 8, 1974
UNITED STATES COURT OF APPEALS

187a

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of January, one thousand nine hundred and seventy-four.

Fred Lowenschuss, Trustee for Fred Lowenschuss Associates Pension Plan, individually and on behalf of all other partners and shareholders of The Great Atlantic & Pacific Tea Company, Inc. who are similarly situated,

Plaintiffs-Appellants.

v.
W. J. Lane, R. J. Barry, R. M. Brown, Jr., W. Corbin, E. J. Davis, H. C. Gilliland, J. E. Ryan, E. A. Lacey, E. F. Langstre, H. B. Potts, J. M. Schiff, P. A. Smith, H. Taylor, Jr., E. J. Toner, W. I. Walsh, W. F. Whitman, J. A. Ziegler (All of whom are officers and Directors of The Great Atlantic & Pacific Tea Company, Inc.), The Great Atlantic & Pacific Tea Company, Inc., C. G. Blumstein, Gulf & Western Industries, Inc., and Kidder, Peabody & Co. Incorporated,

Defendants-Appellees.

upon consideration of

It is hereby ordered that the ~~motion~~ motion made herein by counsel for the

appellant Gulf & Western Industries and Charles G. Blumstein
appellee/ petitioner respondent

by notice of motion dated December 13, 1973 to dismiss the appeals from the United States District Court for the Southern District of New York or alternatively to summarily affirm the orders appealed from that the motion to dismiss the Lowenschuss appeals "G & W" and "A & P" is granted; that the motion to summarily affirm the order of the United States District Court for the Southern District of New York dismissing as moot the Lowenschuss motion to intervene be and it hereby is granted.

It is further ordered that the Lowenschuss appeal from the order of the United States District Court for the Southern District of New York granting summary judgment be and it hereby is remanded to the United States District Court for the Southern District of New York for whatever action the Honorable Kevin T. Duffy, District Judge will take.

S. DANIEL FUSARO
Clerk

By: Edward J. Condiare
Senior Deputy Clerk

BEFORE: HON. JOHN A. DAWSON

HON. J. EDWARD LEBARD

HON. WILLIAM E. FISHER
Circuit Judges

PLAINTIFF'S NOTICE OF MOTION FOR CONSOLIDATION OF ACTIONS
 DATED AUGUST 8, 1973
 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

-----X
 GULF & WESTERN INDUSTRIES, INC., :

Plaintiff, :

-against- :

THE GREAT ATLANTIC & PACIFIC
 TEA CO., INC., :

73 Civil 536 (KTD)

Defendant and Third :

Party Plaintiff, :

-against- :

CHARLES G. BLUHDORN and KIDDER,
 PEABODY & CO., INC., :

Third-Party Defendants. :

-----X
 FRED LOWENSCHUSS, Trustee for :

Fred Lowenschuss Associates :

Pension Plan, individually and :

on behalf of all other persons :

and shareholders of Great Atlantic :

& Pacific Tea Co., Inc. who are :

similarly situated, :

73 Civil 2021 (KTD)

Plaintiff, :

-against- :

W.J. KANE, et al., :

Defendants. :

-----X
 FRED LOWENSCHUSS, Trustee for :

Fred Lowenschuss Associates :

Pension Plan, individually and :

on behalf of all other persons :

similarly situated, :

73 Civil 2931 (KTD)

Plaintiff, :

-against- :

GULF & WESTERN INDUSTRIES, INC., :

CHARLES G. BLUHDORN and KIDDER, :

PEABODY & CO., INC., :

Defendants. :

NOTICE OF MOTION

-----X
 S I R S:

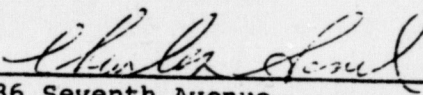
PLEASE TAKE NOTICE that, upon the annexed affidavit of
 Charles Sovel, sworn to the 8th day of August, 1973, and all the

184a
prior pleadings and proceedings heretofore had or filed in the
above actions, Fred Lowenschuss, Trustee for Fred Lowenschuss
Associates Pension Plan, will move the Court, before the Honorable
Kevin T. Duffy, in Room 129 of the United States Courthouse,
Foley Square, New York, New York on the 21st day of August, 1973
at 2:15 o'clock on the afternoon of that day, or as soon
thereafter as counsel may be heard, for an order pursuant to
Rule 42(a) of the Federal Rules of Civil Procedure granting
consolidation of the within three actions for all purposes, and
granting such other and further relief as to the Court may seem
just and proper in the circumstances.

Dated: New York, New York
August 8, 1973

Yours, etc.,

ABRAHAM E. FREEDMAN and
FRED LOWENSCHUSS

by 
36 Seventh Avenue
New York, New York 10011
Attorneys for Plaintiff

TO:

MESSRS. SIMPSON, THACHER & BARTLETT
Attorneys for Defendants, C.G.
Blundorn and Gulf & Western Industries, Inc.
One Battery Park Plaza
New York, New York 10004

MESSRS. SULLIVAN & CROMWELL
Attorneys for Defendant,
Kidder, Peabody & Co.
48 Wall Street
New York, New York 10005

MESSRS. CAHILL, GORDON & REINDEL
Attorneys for Defendant,
Great Atlantic & Pacific Tea Co., Inc.
80 Pine Street
New York, New York 10005

MESSRS. OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
Attorneys for Defendants, Officers and
Directors of Great Atlantic & Pacific Tea Co., Inc.
299 Park Avenue
New York, New York 10017

AFFIDAVIT OF CHARLES SOVEL IN SUPPORT OF FOREGOING
MOTION DATED AUGUST 8, 1973

185a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
GULF & WESTERN INDUSTRIES, INC.,

Plaintiff,

-against-

THE GREAT ATLANTIC & PACIFIC TEA
CO., INC.,

Defendant and Third
Party Plaintiff,

-against-

CHARLES G. BLUHDORN and KIDDER,
PEABODY & CO., INC.,

Third-Party Defendants. :

73 Civil 536 (KTD)

-----X
FRED LOWENSCHUSS, Trustee for
Fred Lowenschuss Associates
Pension Plan, individually and
on behalf of all other persons
and shareholders of Great Atlantic
& Pacific Tea Co., Inc. who are
similarly situated,

Plaintiff,

-against-

W.J. KANE, et al.,

Defendants. :

73 Civil 2021 (KTD)

-----X
FRED LOWENSCHUSS, Trustee for
Fred Lowenschuss Associates
Pension Plan, individually and
on behalf of all other persons
similarly situated,

Plaintiff,

-against-

GULF & WESTERN INDUSTRIES, INC.,
CHARLES G. BLUHDORN and KIDDER,
PEABODY & CO., INC.,

Defendants. :

AFFIDAVIT

-----X
STATE OF NEW YORK)

)
COUNTY OF NEW YORK)

SS.:

CHARLES SOVEL, being duly sworn, deposes and says:

1. I am a member of the firm of Abraham E. Freedman,
counsel of record with Fred Lowenschuss Associates for Fred

186a

Lowenschuss, Trustee for Fred Lowenschuss Associates Pension Plan. I submit this affidavit in support of the application of Fred Lowenschuss, as Trustee for Fred Lowenschuss Associates Pension Plan to consolidate the above captioned actions for all purposes.

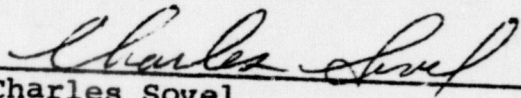
2. The above three actions all arise out of the aborted tender offer made by Gulf & Western for 3,750,000 of A&P stock. As is more fully set forth in the Memorandum of Law submitted with this motion, each of the actions involve common questions of law and fact, namely those relating to the legality or illegality of the tender offer.

3. Fred Lowenschuss, as Trustee of Fred Lowenschuss Associates Pension Plan, is the named plaintiff in the two Lowenschuss actions and previously has moved to intervene in the action between Gulf & Western and A&P.

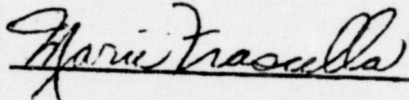
4. This Court in its opinion of July 25, 1973 in Lowenschuss I, at footnote 3 commented that no motion to consolidate had been made. This comment was made in a context that indicated that a motion to consolidate would have been appropriate. We submit that consolidation not only is appropriate but necessary to prevent inconsistent results. Moreover, the Court denied the request to amend the complaint in Lowenschuss I on the basis that Lowenschuss II was pending. While, as is more fully set forth in plaintiff's motion for reargument of the Lowenschuss I decision, it is submitted that such amendment should be permitted, the fact remains that unless consolidation is granted, there is the possibility of inconsistent results being reached

187a
in the litigation by reason of the fact that Gulf & Western,
Bluhdorn and Kidder, Peabody are taking inconsistent positions
in these actions, contending that this tender offer was legal
in the Gulf & Western vs. A&P action and Lowenschuss II, but
contending that it was illegal in Lowenschuss I.

WHEREFORE deponent prays the Court to grant the within
motion to consolidate.


Charles Sovel

Sworn to before me this
8th day of August, 1973.



MARIE FRASCELLA
Notary Public, State of New York
No. 41-4502823
City of Queens County
Notary Expires March 20, 1975

188a

AFFIDAVIT OF L. FRANCIS HUCK IN OPPOSITION TO FORE-
GOING MOTION
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
GULF & WESTERN INDUSTRIES, INC., :

Plaintiff, :

-against- :

THE GREAT ATLANTIC & PACIFIC TEA :
CO., INC., :

73 Civil 536 (KTD)

Defendant and Third :
Party Plaintiff, :

-against- :

CHARLES G. BLUHDORN and KIDDER, :
PEABODY & CO., INC., :

Third-party Defendants. :
: :
-----X

FRED LOWENSCHUSS, Trustee for Fred :
Lowenschuss Associates Pension Plan, :
individually and on behalf of all :
other persons and shareholders of :
Great Atlantic & Pacific Teat Co., :
Inc., who are similarly situated, :

Plaintiff, :

-against- :

73 Civil 2021 (KTD)

W. J. KANE, et al., :

Defendants. :
-----X

FRED LOWENSCHUSS, Trustee for Fred :
Lowenschuss Associates Pension Plan, :
individually and on behalf of all :
other persons similarly situated, :

Plaintiff, :

-against- :

73 Civil 2931 (KTD)

GULF & WESTERN INDUSTRIES, INC., :
CHARLES G. BLUHDORN and KIDDER, PEABODY :
& CO., INC., :

Defendants. :
: :
-----X

AFFIDAVIT

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

L. FRANCIS HUCK, being duly sworn, deposes and says:

1. I am an associate attorney of the firm of Simpson Thacher & Bartlett, New York, New York, attorneys of record for defendants Charles G. Bluhdorn ("Mr. Bluhdorn") and Gulf & Western Industries, Inc. ("G&W") in Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Company, Inc., S.D.N.Y. 73 Civ. 536 (KTD), commenced in the United States District Court for the Southern District of New York on February 5, 1973; Lowenschuss v. Kane, S.D.N.Y. 73 Civ. 2021 (KTD), commenced in the United States District Court for the Eastern District of Pennsylvania on February 15, 1973, and transferred to the United States District Court for the Southern District of New York on April 2, 1973; and Lowenschuss v. Gulf & Western Industries, Inc., S.D.N.Y. 73 Civ. 2931 (KTD), commenced in the United States District Court for the Eastern District of New York on May 7, 1973, and transferred to the United States District Court for the Southern District of New York on July 2, 1973.

2. On July 25, 1973, G&W, by action taken by its Board of Directors, terminated its tender offer for 3.75 million shares of common stock of The Great Atlantic & Pacific Tea Co., Inc. ("A&P"). Since that time instructions have been given to and carried out by Manufacturers Hanover Trust Company, depositary for the tender offer, to return all tendered shares to those who tendered them.

3. On July 25, 1973, this Court in Lowenschuss v. Kane granted summary judgment in favor of and dismissed the complaint as to defendants G&W, Mr. Bluhdorn and Kidder, Peabody and Co., Inc. On August 23, 1973, this Court denied plaintiff's motion for reargument in the case.

4. A motion to dismiss Lowenschuss v. Gulf & Western Industries, Inc. will be filed shortly on behalf of defendants G&W and Mr. Bluhdorn.

5. Motions to consolidate under Rule 42(a) of the Federal Rules of Civil Procedure should be granted only to "avoid unnecessary costs or delay." The circumstances of these cases, as set forth herein, show that such a motion is inappropriate at this time.

L. Francis Huck

Sworn to before me this
day of August, 1973

Notary Public

191a

AFFIDAVIT OF DENIS MC INERNERY IN OPPOSITION TO MOTION
TO CONSOLIDATE DATED AUGUST 27, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- -x

| | | |
|----------------------------------|---|-------------------|
| GULF & WESTERN INDUSTRIES, INC., | : | |
| Plaintiff, | : | |
| -against- | : | |
| THE GREAT ATLANTIC & PACIFIC TEA | : | |
| COMPANY, INC., | : | |
| Defendant and Third | : | 73 Civ. 536 (KTD) |
| Party Plaintiff, | : | |
| -against- | : | |
| CHARLES G. BLUHDORN and KIDDER, | : | |
| PEABODY & CO., INC., | : | |
| Third-Party Defendants. | : | |

----- -x

| | | |
|---------------------------------------|---|--------------------|
| FRED LOWENSCHUSS, Trustee for Fred | : | |
| Lowenschuss Associates Pension Plan, | : | |
| individually and on behalf of all | : | |
| other persons and shareholders of The | : | 73 Civ. 2021 (KTD) |
| Great Atlantic & Pacific Tea Company, | : | |
| Inc. who are similarly situated, | : | |
| Plaintiff, | : | |
| -against- | : | |
| W. J. KANE, et al., | : | |
| Defendants. | : | |

----- -x

| | | |
|--------------------------------------|---|--------------------|
| FRED LOWENSCHUSS, Trustee for Fred | : | |
| Lowenschuss Associates Pension Plan, | : | |
| individually and on behalf of all | : | |
| other persons similarly situated, | : | 73 Civ. 2931 (KTD) |
| Plaintiff, | : | |
| -against- | : | |

| | | |
|---|---|--|
| GULF & WESTERN INDUSTRIES, INC., CHARLES G. | : | |
| BLUHDORN and KIDDER, PEABODY & CO., INC., | : | |
| Defendants. | : | |

----- -x

| | | |
|--------------------|---|------|
| STATE OF NEW YORK |) | |
| | : | ss.: |
| COUNTY OF NEW YORK |) | |

DENIS MCINERNEY, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill Gordon & Reindel, attorneys for The Great Atlantic & Pacific Tea Company, Inc. ("A&P"). I make this affidavit in opposition to the motion of Fred Lowenschuss Associates to consolidate the three above-entitled actions.

2. A&P is a party in only the first of these actions, Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Company, Inc., et al., 73 Civ. 536 (KTD) (the "Tender Offer Case"). A&P and its directors were named as parties in the second action, Fred Lowenschuss v. W. J. Kane, et al., 73 Civ. 2021 (KTD) ("Lowenschuss I"). When, however, they moved to dismiss, Mr. Lowenschuss, rather than meeting the motion, agreed to drop the suit against those parties. A&P was never a party to the third action, Fred Lowenschuss v. Gulf & Western Industries, Inc., et al., 73 Civ. 2931 (KTD) ("Lowenschuss II").

3. A&P is thus not a party in either the two suits brought by Mr. Lowenschuss purportedly on behalf of various classes of A&P stockholders, and it appears that Mr. Lowenschuss' present grievances are directed against Gulf & Western Industries, Inc. ("G&W"). We submit that there is no reason whatsoever why A&P need be further embroiled in either of Mr. Lowenschuss' two suits.

4. To be sure, Mr. Lowenschuss did move to intervene in the only action to which A&P is still even a party, the Tender Offer Case, and, in that connection, we refer to our papers in

opposition to that motion in support of our opposition to the instant application. Moreover, Mr. Lowenschuss' subsequent voluntary dismissal of Lowenschuss I as against A&P and its directors, and his decision not to name A&P in Lowenschuss II, further demonstrate that involving A&P in these unrelated suits would be an improper and unjust burden. Finally, G&W's recent termination of its tender offer and return of the shares tendered has largely mooted a major part of the Tender Offer Case, and the remaining issues involved in that case are separate and distinct from the issues in Lowenschuss I and II.

5. Accordingly, A&P respectfully submits that this motion to consolidate should be denied since consolidation would only complicate and delay the final resolution of the only case to which A&P is a party.

Denis McInerney
 Denis McInerney

Sworn to before me this
 27th day of August, 1973.

Stella Marotta
 Notary Public

STELLA MAROTTA
 Notary Public, State of New York
 No. 24-2544450
 Qualified in Kings County
 Certificate filed in Kings County
 Commission Expires March 30, 1975

194a

PLAINTIFF'S NOTICE OF MOTION TO REMAND, VACATE DECISION
AND FOR OTHER RELIEF DATED APRIL 5, 1974
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan, :
Individually and on behalf of all :
other persons and shareholders of : 73 CIV. 2021
Great Atlantic & Pacific Tea Co., :
Inc. who are similarly situated, : (K.T.D.)

-Against- :
W. J. KANE, et al. : NOTICE OF MOTION

-----X

TO: Messrs. Simpson, Thacher & Bartlett
Attorneys for Defendant
Gulf & Western Industries, Inc.
and Charles G. Bluhdorn
1 Battery Park Plaza
New York, New York

Sullivan & Cromwell
Attorneys for Defendant
Kidder, Peabody & Co., Inc.
48 Wall Street
New York, New York 10005

S I R S:

PLEASE TAKE NOTICE that, upon the annexed affidavit of
Fred Lowenschuss, Esq., sworn to the 5th day of April, 1974, and
all the prior proceedings heretofore had or filed herein, the under-
signed will move the Court, in Room 35 of the United States Court-
house, Foley Square, New York, New York on Tuesday, April 23, 1974,
at 2:15 PM, or as soon thereafter as counsel may be heard, for an
Order remanding the within action to the United States District
Court for the Eastern District of Pennsylvania and for an Order

195a

vacating the decisions of this Court dated July 25, 1973 and August 23, 1973, and for such other and further relief as to the Court may seem just and proper in the circumstances.

Dated: New York, New York
April , 1974.

Yours, etc.,

FRED LOWENSCHUSS ASSOCIATES

and

ABRAHAM E. FREEDMAN

By Charles S. Savel
Attorneys for Plaintiff
346 West 17th Street
New York, New York 10011
(212) 929-8410

196a

**AFFIDAVIT OF FRED LOWENSCHUSS IN SUPPORT OF FOREGOING
MOTION DATED APRIL 5, 1974**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan,
Individually and on behalf of al
other persons and shareholders of
Great Atlantic & Pacific Tea Co.,
Inc. who are similarly situated,

VS.

73 Civ. 2021

(K.T.D.)

W. J. KANE, H. J. BERRY, R. M. BROWN
JR., W. CORBUS, D. K. DAVID, H. C.
GILLESPIE, J. S. KROH, E. A. LE PAGE,
R. F. LONGACRE, M. D. POTTS, J. M.
SCHIFF, P. A. SMITH, H. TAYLOR, JR.,
E. J. TONER, W. I. WALSH, N. F.
WHITTAKER, J. A. ZEIGLER (All of whom
are officers and directors of Great
Atlantic & Pacific Tea Co., Inc.)
and GREAT ATLANTIC & PACIFIC TEA
CO., INC. and C. G. BLUHDORN and
GULF & WESTERN INDUSTRIES, INC. and
KIDDER, PEABODY & CO.,

COMMONWEALTH OF PENNSYLVANIA :

SS

CITY AND COUNTY OF PHILADELPHIA :

FRED LOWENSCHUSS, being duly sworn according to law,
deposes and says:

1. I am one of the attorneys representing the class
Plaintiffs on behalf of the law firm of Fred Lowenschuss Asso-
ciates, Attorneys at Law and I am also the Trustee of the pension
plan which is the named plaintiff herein. I make this affidavit
in support of plaintiff's Motion to Retransfer or in the Alter-
native to Reassign and Motion to Vacate.

2. This action was originally instituted in the Eas-
tern District of Pennsylvania on February 15, 1973, under Civil
Action #73-339 and assigned to the Honorable Clarence Newcomer,
U. S. District Court Judge for the Eastern District of Pennsylvania.

3. Thereafter, a Motion to Transfer under Section
1404(a) of 28 U. S. Code was filed on behalf of the Great Atlantic
& Pacific Tea Co. and/or its officers and directors and upon

the affidavit of Ralph P. Schipa, general counsel of the Great Atlantic & Pacific Tea Co., Inc., for the transfer of this action to the Southern District of New York for the convenience of said defendant and its officers and directors, and also because a similar action arising out of the same factual circumstances and series of transactions was pending before the Honorable Kevin Thomas Duffy, U. S. District Judge for the Southern District of New York.

4. Said Motion for Transfer filed by "A & P" was not opposed by plaintiff herein, but requests were made that this action be consolidated with the pending intercorporate litigation of G & W vs. A & P, Civil Action #73-536.

5. On March 30, 1973, this action was transferred to the Southern District of New York before the Honorable Kevin Thomas Duffy.

6. That the underlying reasons for the transfer of this action to the Southern District of New York no longer exist for the following reasons:

- A. The defendants herein opposed consolidation of this action with the intercorporate litigation between G & W and A & P, and this Court never consolidated said action;
- B. That on July 16, 1973, a stipulation was filed and approved by this Court to discontinue the action against A & P and its officers and directors who were the movants behind the transfer of this case to the Southern District of New York;
- C. That the intercorporate litigation between G & W and A & P was settled and withdrawn and was no longer pending,

which action has been affirmed by the Circuit Court of Appeals for the Second Circuit;

- D. That plaintiff has a right to choose his venue and forum for bringing an action;
- E. That the named plaintiff herein has no business and conducts no business within the Southern District of New York other than this litigation;
- F. That the remaining named defendants herein, G & W, Kidder, Peabody & Co., and C. Bluhdorn, have extensive business interests and conduct said business within the Commonwealth of Pennsylvania and in the area of the Eastern District of Pennsylvania;
- G. That said defendants herein have legal counsel which they have retained and used from time to time in the Philadelphia Area who are most competent to handle defendants' matters.

7. For the foregoing reasons, the Motion to Retransfer this action to the Eastern District of Pennsylvania should be granted.

MOTION TO VACATE AND EXPUNGE THE OPINION OF
THIS COURT OF JULY 25, 1973, THE ENDORSEMENT OPINION OF
AUGUST 23, 1973, AND THE ORDERS FILED THEREAFTER

8. The following reasons are assigned for vacating and expunging the opinions and Orders of this Court:

- A. The opinion of the Honorable Kevin Thomas Duffy of July 25, 1973, contains findings of fact which are contrary to the facts of record as follows:

- I. On page 13 of Judge Duffy's Opinion, there is set forth that under the terms of the tender offer, there was to be no final contract until the end of the day on February 13, 1973, and that any tendering shareholder could have withdrawn their shares at that time.

Both the express terms of the offer and the facts of record clearly demonstrate that this was not the case. Under the express terms of the tender offer, a binding contract was created whenever A & P shareholders accepted the offer by tendering shares in the manner prescribed in the tender offer. G & W had no option to reject the shares if they were properly tendered. Therefore, it is clear that the creation of the binding contract was not deferred until the end of the day on February 13, 1973, as the lower Court stated. Furthermore, Judge Duffy's Opinion ignored the fact that under the express terms of the tender offer, the tendering shareholders could not withdraw their shares between February 9, 1973 and April 3, 1973. During that period of time the tenders were to be irrevocable. (Tender Offer, §3)

The record clearly shows that after February 9, the earliest time that tendering shareholders had the option to revoke their tender was March 14, 1973, when G & W first announced that tendered shares could be withdrawn. Therefore, there was a period of at least

twenty-nine days during which plaintiff and the class were "deprived of the use of their shares." During this time, the market price of A & P stock dropped from a high of 18-5/8 on February 9 and a high of 18-1/2 on February 13, to a low of 14-5/8 on March 14, 1973, the day that G & W announced that the tendered shares could be withdrawn. As the price of A & P stock plummeted the tendering shareholders had no opportunity to sell their shares to avoid further losses, even if they had wanted to do so, because during that time, the tenders were irrevocable.

II. The sole stated reason of Judge Duffy in dismissing this class action as appears in his Honor's Opinion of July 25, 1973, was lack of damages - an issue which was raised sua sponte by Judge Duffy and which had not been briefed or argued by either side. "Since plaintiff and the class he represents have suffered no damage cognizable at law, the complaint must be dismissed."

(Page 15 of Judge Duffy's Opinion)

As had been pointed out in Roman Numeral I. above, the tendering shareholders had been deprived of the use of their shares and the finding of fact to the contrary by His Honor as set forth on page 14 of his Opinion is contrary to the well-established facts.

Furthermore, G & W has at all times recognized the existence of damages to plaintiff class and that irreparable injury would be caused to the tendering shareholders if the tender offer was not consummated. On page 10 of the brief of G & W to the Second Circuit Court of Appeals in the case of G & W vs. A & P, cited supra, G & W stated:

"The district Court failed entirely to consider the irreparable injury to the tendering A & P shareholders should the tender offer not be consummated."

In addition, the applicable measure of damages as recognized by this Court and the Second Circuit Court of Appeals is set forth in the case of Bache & Co. v. International Controls Corporation, 339 F. Supp. 341 (S.D.N.Y. 1972) aff'd per cur. 469 F.2d 696 (2nd Cir. 1972). In the Bache case, the Court held that the plaintiffs tendering of the shares created a binding contract, and that defendant was liable for damages for breach of contract when it refused to accept the shares or pay the price stated in the tender offer. See separate Opinion on Liability, Bache & Co. v. International Controls Corporation, 324 F. Supp. 998, 1005 (S.D.N.Y. 1971).

III. His Honor, Judge Duffy, in dismissing this class action and in the writing of the Opinion in support of said dismissal, has construed disputed questions of material fact against the plaintiff and members of

the class contrary to the well-established rule that all facts and inferences to be drawn therefrom are to be construed in the light most favorable to the party against whom summary judgment or dismissal is sought.

- IV. It is further well-established law that even though both parties may have moved for summary judgment, it may not be proper to grant either motion if the record reflects a genuine issue of fact with regard to their respective legal theories. Hindes v. U.S., 325 F.2d 150 (5th Cir. 1964), cert. den. 377 U.S. 908; American Fidelity & Casualty Co. v. London & Edinburgh Ins. Co., 354 F.2d 214, (4th Cir. 1965). The burden of showing the absence of a genuine issue as to any material fact is upon the party moving for summary judgment. First National Bank of Cincinnati vs. Pepper, 454 F.2d 626 (2nd Cir. 1972).

B. Request is hereby made that this Court vacate its previous decisions and Orders and/or reassign this case for the following reasons:

- I. Judge Duffy felt compelled to refer the conduct of Attorney Lowenschuss in instituting this suit to the Disciplinary Board of the Supreme Court of Pennsylvania;
- II. In this Court's Opinion of July 25, 1973, Judge Duffy felt compelled to allude to the need for investigation of Attorney Lowenschuss' conduct;
- III. The Disciplinary Board of the Supreme Court of Pennsylvania has completely exonerated Attorney Lowenschuss of any wrongdoing or unethical conduct;

- IV. To allow the Court's Opinion to remain in its present form would unduly and needlessly harm the professional reputation of Attorney Lowenschuss and serve no useful purpose;
- V. At stake in this litigation is not only plaintiff's claim but also the claims of other members of the class;
- VI. Since there has been a misunderstanding in regard to the ethics and motivation of Attorney Lowenschuss in instituting this suit, which has created an atmosphere which may tend to prejudice the interests of plaintiff and the class being represented, it is respectfully requested that plaintiff and members of plaintiff's class be permitted to have this case reassigned.

9. The Orders of the Court issued after the filing of the Opinion and endorsement Opinion are inconsistent and tend to mislead and confuse the members of the plaintiff class as to the holdings of the Court, in that the proposed notice to the class completely fails to mention that the Court's Opinion and dismissal was based on lack of damages.

10. Although the Court's endorsement Opinion of August 23, 1973, denying a rehearing stated:

"I would, however, be glad to hear from any other member of the class as to why my decision is not proper...."

The proposed notice approved by the Court would not permit members of the class to dispute the Court's holding regarding lack of damages, since the notice contains no mention of lack of damages being the grounds for dismissal. The position of at least

one member of the class and the damages he suffered is outlined 204a
in the unsolicited letter received by plaintiff's counsel from
Samuel Guttwein, dated October 17, 1973, a copy of which is an-
nexed hereto as Exhibit "A". (Said letter speaks for itself.)

11. Events have occurred since this Court handed down its
Opinion on July 25, 1973, which conclusively refute a number of
the assumptions upon which said Opinion was based, including the
following:

A. In said Opinion of July 25, 1973, Judge Duffy stated
that G & W had at all times vigorously opposed the
preliminary injunction sought by A & P, and that
G & W had always fulfilled its duty to deal fairly
with tendering shareholders during the extensions
of the tender offer. These assumptions are re-
futed by the fact that, following the affirmance
of the preliminary injunction by the Second Circuit
Court of Appeals, G & W entered into an arrange-
ment with A & P whereby proceedings were stayed
for a prolonged length of time, the tender offer
was withdrawn, and the case settled and dismissed,
without regard to the interests of the tendering
shareholders. G & W had no intentions of pro-
ceeding to a trial on the merits and misled the
tendering shareholders by repeatedly extending
the tender offer when G & W had no intention to
take the steps necessary to consummate, and was
merely extending the offer as a tactic in the pre-
sent litigation.


B. Judge Duffy's Opinion of July 25, 1973, to the
extent that it was based on the doctrine of im-
possibility of performance, relied on the assump-
tion that the preliminary injunction issued in the

205a

case of G & W vs. A & P made it impossible for G & W to perform its contract with tendering shareholders. However, now that the case of G & W vs. A & P has been settled and discontinued by stipulation of the parties, as approved by this Court and affirmed by the Court of Appeals, the preliminary injunction is no longer in effect and cannot provide any basis for claiming impossibility of performance. The established law in cases of this nature involving preliminary injunctions sets forth that a promisor is not excused from performance or in the alternative from the payment of damages. In Peckham v. Industrial Securities Co., 31 Del. 200 (1921), which case was cited with approval in Brown vs. J. P. Morgan & Co., 177 Misc. 626, 635, 31 N.Y. S. 2d, 323,333 (1941), the Court stated:

"....But they do seem to be uniform in holding that where the contract is lawful and possible of fulfillment, such an injunction will not excuse a breach. And there is also uniformity in this: that where the injunction or other judicial interference is caused by the fault of the defendant, it will not excuse the performance of his contract."

WHEREFORE, deponent prays the Court to grant the relief herein requested.


FRED LOWENSCHUSS, ESQUIRE

Sworn to and subscribed
before me this 5th day
of April, 1974.

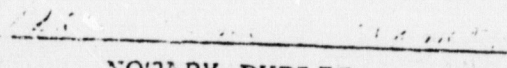

NOTARY PUBLIC

EXHIBIT A - LETTER FROM SAMUEL GUTWEIN DATED OCTOBER 17,
1973 - ANNEXED TO FOREGOING AFFIDAVIT
OF FRED LOWENSCHUSS

SAMUEL GUTWEIN
45 FAIRVIEW AVENUE
NEW YORK, N. Y. 10040

October 17th, 1973

Fred Lowenschuss Associates
2 Penn Center Plaza
Philadelphia, Pa.

Dear Sir:

I am also a victim of the tender-offer of Gulf and Western for A & P shares. The shares were returned to me a few weeks ago. Meanwhile I read the decision from Judge Kevin Thomas Duffy against you and other shareholders of A & P who brought suit against Gulf & Western which decidedly I think does not make any sense. According my opinion no matter how you turn this case the fact remains that Gulf & Western by offering an illegal transaction - even, made in good faith - caused big money losses to people who were not at fault in any way. Therefore it is only fair that Gulf & Western should be liable for damages.

Please let me know what you did in this case after the decision against us from Judge Kevin. Also what happened with the preliminary injunction against the tender offer. Was it followed by a permanent injunction? or "the litigation about this still pending." Please let me know if there is anything else that could be done in this case.

Sincerely yours,

s/ Samuel Gutwein

AFFIDAVIT OF JOHN A. GUZZETTA IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND, VACATE DECISION AND FOR OTHER UNITED STATES DISTRICT COURT RELIEF DATED APRIL 18, 1974

SOUTHERN DISTRICT OF NEW YORK

----- x

| | | |
|--|---|------------------|
| FRED LOWENSCHUSS, Trustee for Fred | : | |
| Lowenschuss Associates Pension Plan, | : | |
| individually and on behalf of all | : | |
| other persons and shareholders of The | : | |
| Great Atlantic & Pacific Tea Co., Inc. | : | <u>AFFIDAVIT</u> |
| who are similarly situated, | : | |
| | : | 73 Civ. 2021 |
| Plaintiff, | : | (K.T.D.) |
| | : | |
| -against- | : | |
| | : | |
| W. J. KANE, H. J. BERRY, etc., | : | |
| | : | |
| Defendants. | : | |

----- x

STATE OF NEW YORK)
 : ss.:
 COUNTY OF NEW YORK)

JOHN A. GUZZETTA, being duly sworn, deposes and says:

1. I am a member of the firm of Simpson Thacher & Bartlett, counsel for defendants Gulf & Western Industries, Inc. ("G&W") and Charles G. Bluhdorn in this action and I am fully familiar with all the facts hereinafter set forth. I submit this affidavit in opposition to plaintiff's motion pursuant to 28 U.S.C. 1404(a) to "retransfer" this action to the United States District Court for the Eastern District of Pennsylvania and his motion to vacate all prior decisions in this action.

2. Plaintiff's motion follows his second failure to obtain relief from this Court's decision of July 25, 1973, and is clearly a frivolous attempt by plaintiff to seek yet another reconsideration of that decision, this time before another court. On August 23, 1973, plaintiff's motion for

reargument was denied. Although well aware of the status of the case, plaintiff, proceeding on a technicality, then sought an appeal from a non-final, non-functional and out-dated order of this Court which had really been superseded by another order. The Court of Appeals rejected this attempt and, on G&W's motion it remanded the case to this Court by order dated January 8, 1974, for such action as was necessary to conform the record to the true intent of the Court. (See Exhibit A attached).

3. This action, commenced on February 15, 1973, was ordered transferred to this Court on motion of defendant A&P on April 2, 1973. According to plaintiff, he did not oppose the transfer. It must be assumed that he had no serious objections. Now, more than a year later, after failing to have his theories adopted by this Court, plaintiff asserts that he would like to go back to the Eastern District of Pennsylvania.

4. There is absolutely no basis for retransferring the action to Pennsylvania. All of the defendants either reside in New York or have their principal place of business here, the cause of action arose in New York. On the other hand, the plaintiff-class is scattered throughout the United States. Lowenschuss is merely a representative plaintiff; he knows no special facts and would probably not even be a witness at trial. This Court, and indeed the Court of Appeals in this Circuit has already committed substantial time to this action and related actions and is fully familiar with the underlying facts - and although plaintiff claims that the termination of the original litigation between G&W and A&P (73 Civ. 536) has obviated the necessity for continuance of the instant action in New York, which is a frivolous assertion.

he also omits mention of Fred Lowenschuss, etc., et al. v. Gulf & Western Industries, Inc., et al. (73 Civ. 2688, KTD), pending before this Court. This second action was transferred to this Court on motion of G&W and Mr. Bluhdorn.

5. Plaintiff's allegations regarding supposed factual errors in this Court's decision of July 25th are similarly frivolous. For example, he chiefly claims that the Court erred in assuming that the A&P shareholders could have withdrawn their shares between the time this Court enjoined the tender offer and its order was affirmed on appeal (February 9, 1973 to March 12, 1973) because in its terms, the offer had stated that tenders were "irrevocable." The simple answer is that any assumption either way is inconsequential to the result, because it is nowhere suggested, much less alleged, that plaintiff (or any member of his class) ever sought the return of his shares during that period but was refused. To the contrary, in that period of time G&W was aggressively pursuing an expedited appeal of this Court's order and plaintiff here was then firmly allied with G&W's position, pressing the idea that his shares should be retained and purchased by G&W. What would have happened if he had requested an interim return is entirely speculative, since no request was made, and thus in the absence of such request his recently claimed "damages" are, in the truest sense, not legally cognizable. Almost immediately upon affirmance of the court's order, G&W of course affirmatively announced that tenderors desiring to return their shares should do so.

6. Finally, plaintiff's idea that this Court's decision on plaintiffs "contract" claim was somehow

overthrown by the Court's ordering the dismissal of the G&W - A&P litigation on consent of the parties, is so self-evidently unreal that it merits no consideration. It should be noted that the Court of Appeals on January 8, 1973 dismissed plaintiff's appeal from that order and summarily affirmed the denial of his application to intervene there. (See Exhibit B attached). The plain fact is that this Court's order acted as a bar to this offer during the only period that it had commercial reality, and it is a bar that now does permanently stop the offer, since it has not been overturned. The doctrine of impossibility, which underlay this Court's opinion, is based upon practical realities and must be given pragmatic application.

7. Plaintiff's objections to the suggestions made in footnote 1 of this Court's opinion of July 25, 1973 as to the propriety of his conduct in the instant case are irrelevant to this motion. Although we take no position on the question of plaintiff's conduct, his overemphasis of this point makes clear the true purpose of this motion. Plaintiff has provided no information about the alleged inquiry into his conduct by the Disciplinary Board of the Pennsylvania Supreme Court. We have no way of knowing what facts were presented to that body and have seen no report of its findings. In any case he apparently feels that this "exoneration" is insufficient to restore his professional reputation.

8. During the tender offer, it is clear that G&W acted fairly, and this Court has so found. The instant motions clearly serve no legitimate purpose other than to give plaintiff a chance to seek more hearings in more courts

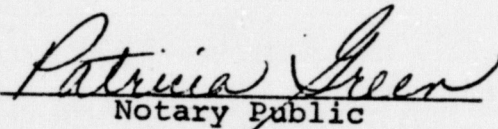
211a

than anyone ever thought might be tolerated by judicial sensibility, and they violate the principle of judicial repose and should be rejected. Instead we respectfully suggest that a conference of all parties be arranged, consistent with this Court's schedule, finally to effectuate this Court's decision of July 25, 1973.

WHEREFORE, for the foregoing reasons, the instant motions should be dismissed.


John A. Guzzetta

Sworn to before me this
18th day of April, 1974.


Notary Public

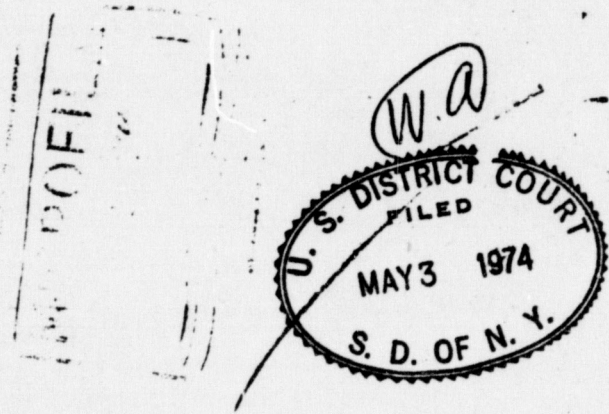
PATRICIA GREEN
Notary Public, State of New York
No. 24-6641753
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

75

The within motion ~~is~~ denied in open court
So ordered.

New York, New York
May 2, 1974

Kevin Thomas Duffy
KEVIN THOMAS DUFFY
U. S. D. J.



73 CIV. 2021 (K.T.D.)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED LOWENSCHUSS, Trustee for
Fred Lowenschuss Associates
Pension Plan, Individually and
on behalf of all other persons
and shareholders of Great
Atlantic & Pacific Tea Co. Inc.
who are similarly situated,

-Against-

W. J. KANE, et al.

NOTICE OF MOTION

ABRAHAM E. FREEDMAN

Attorney for
PLAINTIFF
Office and Post Office Address
346 WEST 17TH STREET
BOROUGH OF MANHATTAN NEW YORK, N.Y. 10011

73 Civ. 2021
(K. T. D.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FRED LOWENSCHUSS, Trustee for
Fred Lowenschuss Associates
Pension Plan, Individually and
on behalf of all other persons
and shareholders of Great
Atlantic & Pacific Tea Co.,
Inc. who are similarly situated,

Plaintiff,

-against-

W. J. KANE, H. J. BERRY, etc.,

Defendants.

AFFIDAVIT

SIMPSON THACHER & BARTLETT
Defendants
Gulf & Western Industries, Inc.
and Charles G. Bluhdorn
ONE BATTERY PARK PLAZA, NEW YORK, N. Y. 10004

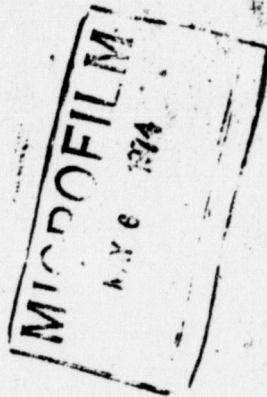
(212) 483-9000

Action denied

So ordered

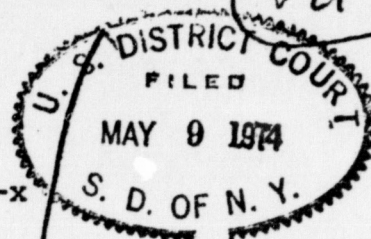
K. T. D.
SSS

MEMORANDUM ENDORSEMENT OF DISTRICT COURT FILED MAY 3, 1974



ORDER OF DISTRICT COURT FILED MAY 9, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan,
individually and on behalf of all
other persons and shareholders of Great
Atlantic & Pacific Tea Co., Inc. who
are similarly situated,

Plaintiff,

-against-

W. J. KANE, H. J. BERRY, R. M. BROWN,
JR., W. CORBUS, D. K. DAVID, H. C.
GILLESPIE, J. S. KROH, E. A. LE PAGE,
R. F. LONGACRE, M. D. POTTS, J. M.
SCHIFF, P. A. SMITH, H. TAYLOR, JR.,
E. J. TONER, W. I. WALSH, N. F.
WHITTAKER, J. A. ZEIGLER (all of whom
are officers and directors of Great
Atlantic & Pacific Tea Co., Inc.) and
GREAT ATLANTIC & PACIFIC TEA CO., INC.
and C. G. BLUHDORN and GULF & WESTERN
INDUSTRIES, INC. and KIDDER, PEABODY &
CO.,

Defendants.

ORDER

73 Civ.
2021 (KTD)

Defendants, C. G. Bluhdorn ("Bluhdorn") and Gulf &
Western Industries, Inc. ("G&W"), having moved this Court
for an order pursuant to Rule 56 of the Federal Rules of
Civil Procedure, granting summary judgment as to it, and
plaintiffs having cross-moved for a summary judgment and said
motions having been returned on the 3rd day of July, 1973,
and the briefs of the parties having been duly submitted and
fully considered by the Court, and an Opinion having been
rendered by the Court (the Honorable Kevin Thomas Duffy) on
the 25th day of July, 1973, and plaintiffs' motion for re-
argument having been denied in an endorsement and order
filed August 23, 1973 and having in mind the order of the

MICROFILM

MAY 9 1974

MAY 10 1974

✓ Court of Appeals at a stated term thereof held on January 8, 1974 remanding the action to this Court, and the parties having been heard further following such remand, and there being no just reason for delay in the entry of judgment, except to the extent hereinafter set forth, it is hereby

ORDERED, ADJUDGED AND DECREED, that the Great Atlantic and Pacific Tea Co., Inc. ("A&P") shareholders who tendered shares in accordance with G&W's invitation for tenders dated February 1, 1973, be, and hereby are, designated as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure for purposes of this action; and, that Fred Lowenschuss be, as Trustee for Fred Lowenschuss Associates Pension Plan, and hereby is, declared to be a fair and adequate representative of this class; and it is further

ORDERED, ADJUDGED AND DECREED, that plaintiff Fred Lowenschuss notify the members of the class of tendering A&P shareholders of this Order and of their presently existing rights, by first class mail to be completed by June 26, 1974, using a form of notice as appears in the attached Exhibit A, which notification shall state that if any member of the class seeks a redetermination of this matter, such member may do so by serving upon the remaining parties hereto and filing with the Court any briefs, affidavits and other material showing why the decision rendered herein is not proper by July 26, 1974, and it is further

ORDERED, ADJUDGED AND DECREED, that this Order shall, upon the expiration of 15 days following the date for receipt of briefs, etc. specified in the foregoing

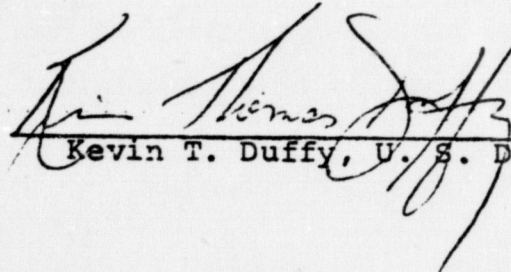
paragraph unless otherwise ordered, constitute a final order and judgment ordering, adjudging and decreeing

(a) that summary judgment be, and hereby is granted in favor of defendants C. G. Bluhdorn, G&W and Kidder, Peabody & Co., Inc. ("Kidder, Peabody"), and against all plaintiffs herein, with prejudice; and

(b) that defendants C. G. Bluhdorn, G&W and Kidder, Peabody have judgment against all plaintiffs dismissing all counts of the complaint against said defendants, with costs; and

(c) that the motion of plaintiff for summary judgment is denied.

Dated: New York, New York
May 8, 1974


Kevin T. Duffy, U. S. D. J.

JUDGMENT ENTERED — 5-10-74

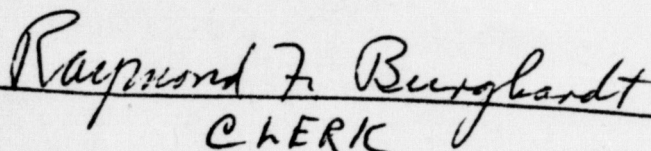

CLERK

EXHIBIT A - FORM OF NOTICE TO SHAREHOLDERS - ATTACHED
TO FOREGOING ORDER

217a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan,
individually and on behalf of all
other persons and shareholders of Great
Atlantic & Pacific Tea Co., Inc. who
are similarly situated,

Plaintiff,

-against-

W. J. KANE, H. J. BERRY, R. M. BROWN,
JR., W. CORBUS, D. K. DAVID, H. C.
GILLESPIE, J. S. KROH, E. A. LE PAGE,
R. F. LONGACRE, M. D. POTTS, J. M.
SCHIFF, P. A. SMITH, H. TAYLOR, JR.,
E. J. TONER, W. I. WALSH, N. F.
WHITTAKER, J. A. ZEIGLER (all of whom
are officers and directors of Great
Atlantic & Pacific Tea Co., Inc.) and
GREAT ATLANTIC & PACIFIC TEA CO., INC.
and C. G. BLUHDORN and GULF & WESTERN
INDUSTRIES, INC. and KIDDER, PEABODY &
CO.,

Defendants.

:
:
:
:
:
NOTICE OF ALL
: A&P SHAREHOLDERS
WHO TENDERED
: SHARES TO G&W

:
:
:
:
:
73 Civ.
2021 (KTD)

-----x
This is to advise you that the United States

District Court for the Southern District of New York has
determined that the above-captioned lawsuit was properly
instituted as a Class Action and has rendered a decision
requiring the grant of summary judgment in favor of de-
fendants C. G. Bluhdorn ("Bluhdorn"), Gulf & Western In-
dustries, Inc. ("G&W"), and Kidder, Peabody & Co. ("Kidder,
Peabody"). By a stipulated consent between plaintiffs
and defendants W. J. Kane, et al. ("A&P's Board") and The
Great Atlantic & Pacific Tea Co., Inc. ("A&P"), and Court
Order pursuant thereto, the action against A&P's Board and
A&P has been dismissed.

The class that plaintiff Fred Lowenschuss ("Lowenschuss") has been held to represent, all A&P shareholders who tendered shares pursuant to G&W's tender offer of February 1, 1973, may include you. Accordingly, your rights may be affected by the lawsuit and its results.

The Court's opinion is restricted to alleged contract claims for damages and specific performance. It reasons that, even assuming that there was a "contract" between G&W and persons who tendered A&P shares, the Court's own preliminary injunction, which enjoined G&W from purchasing such shares, rendered impossible the performance of any such "contract" and thus excused both sides from the obligations under it; that there is a condition implicit in every tender offer to the effect that its consummation not be enjoined; that the threat and existence of litigation and thus the possibility of an injunction being issued was clear early in the offer's pendency; that G&W could not be said to have brought the injunction upon itself but rather had vigorously opposed it; and that the alleged antitrust questions sufficient to preclude consummation of the tender offer were not the fault of any party, but rather rested upon a juxtaposition of economic facts. You are referred to the opinion of this Court, which is available for inspection and copying upon personal request to this undersigned clerk, for details.

The plaintiff has indicated that it will appeal the decision of the Court. Any judgment rendered herein, favorable or adverse, will bind ~~these~~ members of the class who do not request to be excluded. Exclusion may be requested by writing to the undersigned clerk, postmarked

prior to July 26, 1974 referring to the name and number of this case and stating the name, address and the number of A&P shares tendered by the person requesting exclusion.

Any member of the class who does not request exclusion may enter an appearance through his own counsel; otherwise his interest will be represented without cost by plaintiff, who has been judicially deemed to be a fair and adequate representative of the class.

In addition, pursuant to court order, any member of the class who wishes to do so may apply for a redetermination of the Court's ruling by filing any briefs and affidavits it wishes to present with the Court and serve the same upon Abraham E. Freedman, 36 Seventh Avenue, New York, N.Y. 10011; Sullivan and Cromwell, 48 Wall Street, New York, N.Y. 10005; and Simpson Thacher & Bartlett, One Battery Park Plaza, New York, N.Y. 10004 on or before July 26, 1974. Unless otherwise ordered by the Court upon consideration of such an application, its decision rendering summary judgment in favor of the aforesaid defendants will become a final judgment and order upon the expiration of 15 days following the aforesaid date.

You are hereby advised that this notice to you as a tendering A&P shareholder supersedes any and all prior notices which you may have received from any source.

Dated: New York, New York
 , 1974

Clerk
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007
(212) 264-6531

NOTICE OF APPEAL OF PLAINTIFF FRED LOWENSCHUSS, TRUSTEE
FOR FRED LOWENSCHUSS ASSOCIATES PENSION PLAN FILED
AUGUST 19, 1974

220a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan,
individually and on behalf of all
other persons and shareholders of
Great Atlantic & Pacific Tea Co., Inc.
who are similarly situated,

Plaintiff,

-Against-

W. J. KANE, H. J. BERRY, R. M. BROWN,
JR., W. CORBUS, D. K. DAVID, H. C.
GILLESPIE, J. S. KROH, E. A. LE PAGE,
R. F. LONGACRE, M. D. POTTS, J. M.
SCHIFF, P. A. SMITH, H. TAYLOR, JR.,
E. J. TONER, W. I. WALSH, N. F.
WITTAKER, J. A. ZEIGLER (all of whom
are officers and directors of Great
Atlantic & Pacific Tea Co., Inc.) and
GREAT ATLANTIC & PACIFIC TEA CO., INC.
and C. G. BLUHDORN AND GULF & WESTERN
INDUSTRIES, INC. AND KIDDER, PEABODY
& CO.,

Defendants.
-----X

NOTICE OF APPEAL
73 Civ. 2021 (KTD)

NOTICE IS HEREBY GIVEN that Fred Lowenschuss, Trustee for
Fred Lowenschuss Associates Pension Plan, individually and on be-
half of all other persons and shareholders of Great Atlantic &
Pacific Tea Co., Inc. who are similarly situated, plaintiff above
named, hereby appeals to the United States Court of Appeals for
the Second Circuit from the order and judgment entered in this
action on May 10, 1974 which became a final order and judgment as
of August 10, 1974, (a) granting summary judgment in favor of de-
fendants C. G. Bluhdorn, Gulf & Western Industries, Inc. and Kidder
Peabody & Co., Inc., (b) granting judgment in favor of C. G.
Bluhdorn, Gulf & Western Industries, Inc. and Kidder, Peabody & Co.
Inc. against all plaintiffs dismissing all counts of the complaint

against said defendants, and (c) denying the motion of plaintiff for summary judgment.

ABRAHAM E. FREEDMAN

BY 

Attorney for Plaintiffs
346 West 17th Street
New York, New York 10011

TO: Clerk of the District Court
United States Court House
Foley Square
New York, New York 10007

Simpson, Thacher & Bartlett
One Batter Park Plaza
New York, New York 10004
Attorneys for Defendants
C. G. Bluhdorn and
Gulf & Western Industries, Inc.

Sullivan & Cromwell
48 Wall Street
New York, New York 10005
Attorneys for Defendant
Kidder, Peabody & Co., Inc.

Milton Paulson, Esq.
122 East 42nd Street
New York, New York 10017
Attorneys for Rachel C. Carpenter

222a
NOTICE OF APPEAL OF RACHEL C. CARPENTER DATED
SEPTEMBER 3, 1974

RECT 37
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DIST. COURT
SEPT. 4, 1974
S.D. OF NY

FRED LOWENSCHUSS, Trustee for Fred
Lowenschuss Associates Pension Plan,
individually and on behalf of all
other persons and shareholders of
Great Atlantic & Pacific Tea Co., Inc.
who are similarly situated,

Plaintiff,

-against-

W. J. KANE, H.J. BERRY, R.M. BROWN,
JR., W. CORBUS, D.K. DAVID, H.C.
GILLESPIE, J.S. KROH, E.A. LE PAGE,
R. F. LANGACRE, M.D. POTTS, J. M.
SCHIFF, P.A. SMITH, H. TAYLOR, JR.,
E. J. TONER, W.I. WALSH, N.F. WITTAKER,
J.A. ZEIGLER (all of whom are
officers and directors of Great
Atlantic & Pacific Tea Co., Inc.,) and
GREAT ATLANTIC & PACIFIC TEA CO., INC.
and C.G. BLUHDORN AND GULF & WESTERN
INDUSTRIES, INC. AND KIDDER, PEABODY
& CO.,

Defendants.

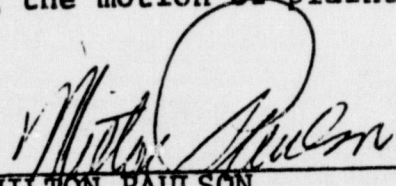
NOTICE OF APPEAL

73 Civ. 2021 (KTD)

S I R S:

NOTICE IS HEREBY GIVEN that Rachel C. Carpenter, a share-
holder of Great Atlantic & Pacific Tea Co., Inc., hereby appeals
to the United States Court of Appeals for the Second Circuit from
the order and judgment entered in this action on May 10, 1974,
which became a final order and judgment as of August 10, 1974 in
favor of defendants, C.G. Bluhdorn and Gulf & Western Industries,
Inc., and Kidder, Peabody & Co., dismissing the complaint herein
against said defendants and denying the motion of plaintiff for
summary judgment.

Dated: New York, N.Y.
September 3, 1974


MILTON PAULSON

Attorney for Rachel C. Carpenter
122 East 42nd Street
New York, New York 10017

TO: Clerk of the District Court
United States Courthouse
Foley Square
New York, New York 10007

Abraham E. Freedman, Esq.
Attorney for Plaintiff
346 West 17th Street
New York, New York 10011

Simpson, Thacher & Bartlett
One Battery Park Plaza
New York, New York 10004
Attorneys for Defendants
C.G. Bluhdorn and
Gulf & Western Industries, Inc.

Sullivan & Cromwell
48 Wall Street
New York, New York 10005
Attorneys for Defendant
Kidder, Peabody & Co., Inc.

TENDER OFFER TO PURCHASE COMMON STOCK OF TEXASGULF, INC.

July 24, 1973

Offer to Purchase for Cash
10,000,000 Shares of Common Stock
of
TEXASGULF INC.
at \$29 (U.S.) per Share (Net)

by

CANADA DEVELOPMENT CORPORATION

| |
|---|
| Scheduled to Expire on August 10, 1973, Unless Extended |
|---|

*To the Holders of Common Stock of**TEXASGULF INC. other than residents of Canada:*

CANADA DEVELOPMENT CORPORATION (the "Offeror"), a Canadian corporation wholly-owned by the Government of Canada, hereby offers to purchase 10,000,000 outstanding shares of the Common Stock, without nominal or par value (the "Common Stock"), of TEXASGULF INC. (the "Company") at \$29.00 per share net, in cash, upon the terms and conditions set forth herein and in the related Letter of Tender. Such number of shares constitutes approximately 22.8% of the total number of shares of Common Stock of the Company outstanding on March 31, 1973.

This Offer is not being made to any shareholders of the Company who are residents of Canada. Accordingly, no shares will be purchased hereunder from any shareholder if the information contained in the Letter of Tender submitted by such shareholder indicates that such shareholder is a Canadian resident.

1. Number of Shares. The Offeror will purchase all shares of Common Stock tendered on or prior to August 10, 1973 up to 10,000,000 shares. If more than 10,000,000 shares are validly tendered, the Offeror will purchase at least 10,000,000 shares and may elect to purchase all or part of the shares tendered in excess of 10,000,000; in the event the Offeror elects to purchase less than all of the shares so tendered, the shares purchased will be allocated among sellers tendering their shares on or prior to August 10, 1973 on a pro rata basis, with appropriate adjustments to avoid the purchase of fractional shares. If this Offer is extended, the Offeror will purchase shares tendered during any such extension on a first-come, first-served basis, unless otherwise announced at the time of such extension.

2. Right to Withdraw Tenders at Certain Times. Except as stated in this paragraph, tenders are irrevocable. Shareholders who tender their shares pursuant to this Offer may withdraw the shares so tendered until 5:00 P.M., New York time, on August 1, 1973. Shares tendered, unless they are purchased by the Offeror, may be withdrawn at any time after September 20, 1973.

*All figures in dollars unless otherwise stated.

Tender Offer to Purchase Common Stock of Texasgulf, Inc.

3. Payment of Purchase Price. Payment for all shares of Common Stock duly tendered and purchased pursuant to this Offer will be made as promptly as practicable after August 10, 1973. If this Offer is extended, payment for shares duly tendered and purchased pursuant to this Offer for which certificates are deposited with the Depository or a Forwarding Agent during any such extension will be made by the Depository promptly after final delivery of shares purchased. Consideration for any shares not purchased will be returned without expense to the tendering stockholder as promptly as practicable. Subject to Paragraph 6 of the Letter of Tender, the Offeror will pay all transfer taxes, if any, payable on the transfer of tendered shares by virtue of the purchase of the shares by the Offeror. All charges and expenses of the Depository and the Forwarding Agents will also be paid by the Offeror.

4. Certain Information Concerning the Company. The shares of Common Stock are traded on the New York, Toronto, Boston, Cincinnati, Detroit, Midwest, Pacific Coast and PBW Stock Exchanges. The high and low sales prices of the shares reported on the New York Stock Exchange for the periods indicated are as follows:

| | High | Low |
|-------------------------------------|--------|--------|
| 1970 | 23 3/4 | 13 |
| 1971 | 24 3/4 | 11 1/2 |
| 1972 | 20 3/4 | 14 3/4 |
| 1973 - 1st Quarter | 25 1/4 | 17 1/4 |
| 2nd Quarter | 24 | 18 1/4 |
| 3rd Quarter (through July 23) | 24 1/2 | 20 3/4 |

The closing price on the New York Stock Exchange on July 23, 1973, was \$23 3/4.

The Company is subject to the informational requirements of the Securities Exchange Act of 1934 and in accordance therewith files reports and other information with the Securities and Exchange Commission (the "Commission") relating to its business, financial statements and other matters. Information, as of particular dates, concerning the Company's directors and officers, their remuneration, options granted to them, the principal holders of the Company's securities and any material interest of such persons in transactions with the Company is disclosed in proxy statements distributed to the Company's stockholders and filed with the Commission. Such reports, proxy statements and other information may be inspected at the principal office of the Commission, 500 North Capitol Street, N.W., Washington, D.C. 20540 and copies may be obtained upon payment of the Commission's customary charges. Such material may also be inspected at the library of the New York Stock Exchange, Inc., 11 Wall Street, New York, New York 10005.

The Company's Initial Report on Form 10-K filed with the Commission for the fiscal year ended December 31, 1972 states that over 1500 total Canadian operations have contributed approximately 60% of the Company's gross sales, and approximately 60% of its operating income (which is calculated before taxes and without giving effect to interest income and expense, corporate and administrative and exploration expenses and extraordinary charges).

5. Tender of Shares. Except as hereinafter provided, to tender shares of Common Stock hereunder, certificates for shares, together with a properly executed Letter of Tender and any other required documents (with signatures guaranteed as required by the Instructions on the Letter of Tender), should be transmitted to and received by the Depository, or a Forwarding Agent, at or prior to 5:00 P.M., New York time, on August 10, 1973, or, if this Offer is extended as herein provided, at or prior to the time specified in such extension (the date and time at which the Offer, as it may be extended from time to time, expires being hereinafter called the "Expiration").

Tenders may be made without the concurrent deposit of stock certificates, if such tenders are made by or through members of any national securities exchange or of the National Association of Securities Dealers, Inc., or by commercial banks or trust companies. In such cases the Letter of Tender, which must be received prior to the Expiration, shall contain a guaranty by such member firm, bank or trust company that, if the shares are accepted, certificates will be deposited with the Depository or a Forwarding Agent within eight business days after the Expiration, and must recite the serial numbers of the certificates representing such shares. Payment for shares so tendered and purchased will be made only against deposit of the certificates. In all other cases the Letter of Tender must be accompanied by stock certificates.

Tender Offer to Purchase Common Stock of Texasgulf, Inc.

If a stockholder desires to tender his shares hereunder and time will not permit his Letter of Tender to reach the Depository or a Forwarding Agent before the Expiration, and tender may be effected if the stock certificates, together with a properly executed Letter of Tender in the accompanying form and any other required documents (with signatures guaranteed as required by the instructions on the Letter of Tender), have been deposited with a member of any national securities exchange or of the National Association of Securities Dealers, Inc., or a commercial bank or trust company, and the Depository or a Forwarding Agent has received, at or before the Expiration, a telegram or letter from such member firm, bank or trust company, setting forth the name of the stockholder, the number of shares tendered and the serial numbers of the certificates representing such shares, and stating that the tender is being made thereby and that the stock certificates, together with the Letter of Tender and any other required documents, have been or will be promptly forwarded by such member firm, bank or trust company to the Depository or a Forwarding Agent. Payment for shares so tendered and purchased will be made only after receipt by the Depository or a Forwarding Agent of such certificates and Letters of Tender and other required documents.

The delivery of the Letter of Tender and the acceptance of this Offer will constitute an agreement between the tendering stockholder and the Offeror, in accordance with the terms of this Offer and the Letter of Tender, only when the duly signed Letter of Tender, or a telegram or letter (as provided above) from a member of a national securities exchange or of the National Association of Securities Dealers, Inc., or a commercial bank or trust company, is received by the Depository or a Forwarding Agent.

6. Dividends and Distributions. If the Company should declare any dividend (other than a customary quarterly cash dividend declared on or prior to August 10, 1973) or any distribution (whether in cash, securities or other property) on, or issue any rights with respect to, its Common Stock, which are payable or distributable to stockholders of record on a date occurring prior to the transfer into the name of the Offeror on the stock transfer records of the Company of the shares purchased hereunder, then (a) the purchase price per share payable by the Offeror will be reduced by the amount of any cash dividend (other than a customary quarterly cash dividend declared on or prior to August 10, 1973), and (b) the gross amount of any such other dividend or distribution or rights shall be required to be remitted by the tendering stockholder to the Depository or a Forwarding Agent for the account of the Offeror and pending such remittance or appropriate assurance thereof, the Offeror shall hold the purchase price or deduct from the purchase price the amount of such cash dividend or distribution or rights as to any shares purchased by the Offeror but not transferred into the name of the Offeror by the record date thereof. If the Company should, during the pendency of this Offer, split its shares of Common Stock or combine or otherwise change its shares of Common Stock, appropriate adjustment in the purchase price, the number of shares offered to be purchased and the price payable hereunder, will be made.

7. Certain Conditions of the Offer. The Offeror shall not be required to purchase or pay for any shares of Common Stock tendered, if before the time of payment therefor:

(a) there shall have been declared in the United States or in Canada any state of war, national emergency, banking moratorium or, in the State of New York, any suspension of payments by banks, or a general suspension of trading on the New York Stock Exchange; or

(b) there shall have been instituted or threatened any action or proceedings before any court or governmental agency, by any governmental agency or any other person, challenging the acquisition by the Offeror of shares of the Common Stock or otherwise relating to this Offer, or otherwise affecting the Offeror or the Company which is, in the judgment of the Offeror's management, materially adverse; or

(c) the Company shall have (i) issued or authorized or proposed the issuance of, additional shares of capital stock of any class, or securities convertible into any such shares, other than Common Stock issued upon exercise of presently outstanding stock options or warrants or upon conversion of presently outstanding convertible securities, or (ii) issued or authorized or proposed the issuance of, any other securities in respect of, in lieu of, or in substitution for, its now outstanding Common Stock, or (iii) authorized or proposed any merger, consolidation, acquisition of assets, disposition of assets, or material change in its capitalization, or other comparable event not in the ordinary course of business, which, in any case in this paragraph (c), in the judgment of the Offeror's management, make it inadvisable to proceed with the purchase of, or payment for, any shares of Common Stock; or

(d) any change shall have occurred or be threatened in the business or operations of the Company and its subsidiaries, taken as a whole, which is, in the judgment of the Offeror's management, materially adverse.

Tender Offer to Purchase Common Stock of Texasgulf, Inc.

8. **Solicitation and Other Fees.** The Offeror will pay to any broker or dealer (including the Dealer Manager) who is a member of a national securities exchange or of the National Association of Securities Dealers, Inc., or to any foreign dealer who agrees to conform to the Rules of Fair Practice of such Association in making solicitations in the United States, or to any commercial bank or trust company ("Soliciting Dealers"), whose name appears in the appropriate space in the Letter of Tender, a solicitation fee of 6¢ for each share purchased hereunder; provided, however, that the maximum fee payable to a Soliciting Dealer in respect of all shares tendered for any one account shall not exceed \$3,250. Loeb, Rhoades & Co. will act as Dealer Manager for the Offeror in connection with this Offer; the Offeror will pay such firm a management fee of 10¢ for each share up to 5,000,000 shares purchased by the Offeror pursuant to the Offer and 5¢ for each share in excess of 5,000,000 shares so purchased, but not in excess of \$650,000 in the aggregate, and will also reimburse such firm for reasonable out-of-pocket expenses incurred by it as Dealer Manager (which fee and reimbursement of expenses shall not be less than an aggregate of \$60,000 in any event). In addition, the Offeror has agreed to indemnify the Dealer Manager against certain liabilities and expenses in connection with the Offer. The Kissel-Blake Organization, Inc. has been retained by the Offeror to solicit acceptances of this Offer and will receive reasonable and customary compensation for such services. The Depository and Forwarding Agents (to be selected) will receive reasonable and customary compensation for their services and will be reimbursed for certain out-of-pocket costs in connection with this Offer.

9. **Extension of Tender Period.** The Offeror has no present intention of extending the time within which shares of Common Stock may be tendered hereunder, but expressly reserves the right to extend such period, at any time or from time to time, by written notice of such extension to the Depository.

10. **Certain Information Concerning the Offeror.** The Offeror is a corporation incorporated by an Act of Parliament of Canada, Statutes of Canada, 19-20 Elizabeth II, c.49 (the "Act"). The principal executive offices of Offeror are located at 130 Albert Street, Ottawa, K1P 5G4, Ontario, Canada.

The principal objective of Offeror is to help develop and maintain strong Canadian controlled and managed corporations in the private sector of the economy. Offeror's principal business is to make equity investments in selected industries either in new enterprises or in existing companies which have their own staff and management. Offeror does not participate in the day to day operations of such companies but directs general policy, maintains appropriate financial controls, seeks to ensure that they have good management development policies and encourages them to remain innovative and growth oriented.

At the present time Offeror's principal direct and indirect investments include the following companies: Polysar Limited (formerly Polymer Corporation Limited), which is engaged in the manufacture of synthetic rubber, latex and plastics; Raylo Chemicals Limited and R & L Molecular Research Limited, which manufacture fine chemicals and are involved in research related to pharmaceuticals, biochemistry and organic chemistry; Connaught Laboratories Limited, which is engaged in production of vaccines, insulin and blood products; and Canmedic, Inc., a new holding company formed to acquire and develop operating companies in the pharmaceutical and medical fields. Offeror also has several investments in venture capital companies in Canada, and is a member of the Gas Arctic-Northwest Project Study Group, which is studying economic, environmental and other aspects of the construction and operation of a large diameter natural gas pipeline from Alaska and the Canadian Arctic to markets in Canada and the United States.

At present all the outstanding common shares of Offeror are beneficially owned by the Government of Canada (the "Government"). No other class of shares is outstanding. In addition to any shares or securities of Offeror which may be acquired by the Government in exchange for the Government investments listed in Section 39 of the Act, the Government is permitted under the Act to invest in cash to a maximum of \$250,000,000 (Cdn.) in the shares of Offeror. The Government is also authorized to lend to Offeror up to \$100,000,000 (Cdn.).

It is the intention of the Act that up to 90% of the voting shares of Offeror ultimately be held by Canadian citizens and residents. No person other than an individual who is a Canadian citizen or a person who is a resident of Canada may purchase, own or hold voting shares of Offeror. Reference is made to the Act for a more complete statement of the permitted ownership of shares of Offeror as well as for the remaining provisions thereof.

TENDER OFFER TO PURCHASE COMMON STOCK OF TEXASGULF, INC.

Offeror is managed by its own board of directors elected by the voting shareholders. During the period that the total number of voting shares of Offeror held by the Government exceeds 50%, the Deputy Minister of Finance and the Deputy Minister of Industry, Trade and Commerce are ex officio members of the board of directors, but are not entitled to vote. The Act also provides that the Government has the right to appoint annually, not more than four directors in lieu of voting the shares held by the Government on any resolution electing members of the board. The present board of directors consists of twenty-three persons, including the two ex officio directors.

It is the present intention of Offeror to make a public offering of its shares in Canada at the earliest practicable date.

The funds to be used by Offeror to purchase shares of the Company's Common Stock tendered pursuant to this Offer will be financed to the extent of approximately \$75,000,000 (Cdn.) from Offeror's own funds, which are presently represented by short-term investments; to the extent of \$75,000,000 (Cdn.) by a subscription by the Government of Canada to purchase additional shares of Offeror; and to the extent of up to \$100,000,000 with funds to be loaned to Offeror by The Toronto-Dominion Bank pursuant to a line of credit which has been established by Offeror with such Bank.

The terms of the loan to be made by The Toronto-Dominion Bank are as follows: (a) amounts borrowed under the arrangement will be available on five business days prior notice in multiples of \$100,000 but not exceeding \$50,000,000 in any one day; amounts taken down shall be for a minimum period of 30 days or such longer periods expressed in multiples of 30 days as Offeror may elect but no amounts borrowed shall mature later than August 1, 1974; (b) the rate of interest on amounts borrowed will be the London-U.S. Dollar Interbank Rate for the appropriate maturities chosen by Offeror plus 1/8% per annum; and (c) amounts borrowed may not be prepaid by Offeror.

The obligation of The Toronto-Dominion Bank to loan funds is subject to the following conditions (all of which have been met): (i) an undertaking from Offeror that it will not without the written consent of The Toronto-Dominion Bank dispose of or otherwise encumber any of its assets, including the shares of Common Stock of the Company purchased pursuant to this Offer to Purchase; (ii) the receipt by the Bank of a Letter of Intent from Offeror to issue additional share capital in a minimum amount of \$125,000,000 (Cdn.) not later than December 31, 1974; and (iii) an acknowledgment by the Government of Canada that it is obligated to purchase for \$125,000,000 (Cdn.) additional common shares from Offeror not later than December 31, 1974, of which amount not less than \$125,000,000 (Cdn.) (which has been subscribed for as stated above) will be taken down in the current fiscal year of the Government which ends on March 31, 1974. The Offeror has agreed with the Bank that it will devote the proceeds of any offering of shares to the public and/or the Government in excess of the \$75,000,000 (Cdn.) which is to be taken down by the Government in its current fiscal year to the repayment of the loans made to Offeror by The Toronto-Dominion Bank. Offeror has also agreed it will endeavour to obtain an undertaking from the Government of Canada to lend \$100,000,000 (Cdn.) to Offeror within one year if requested to do so by Offeror and Offeror has agreed to use the proceeds of any such loans to reduce the loans made to it by The Toronto-Dominion Bank.

The purpose of the transaction is to acquire a sufficient number of shares of Common Stock of the Company, which together with such shares of Common Stock now owned by Offeror, will be equivalent to approximately 55% of the outstanding Common Stock of the Company. While this will be less than a majority of the outstanding Common Stock of the Company it is believed that Offeror will have effective control. Offeror does not have any plans or proposals to liquidate the Company, to sell its assets or to merge it with any other company. Offeror cannot state at this time what changes it might seek to make in the management and business of the Company. It intends to review the situation and, if it acquires effective control of the Company, to make such changes as it deems in the best interest of the business of the Company. Offeror will also seek to acquire such representation on the board of directors of the Company as is appropriate to its shareholdings.

In addition, if as a result of the Offer to Purchase Offeror does not acquire effective control of the Company or if other circumstances warrant, it may subsequently elect to acquire additional shares of Common Stock of the Company by purchase on the open market or otherwise on terms which cannot now be predicted (but which may be either less favourable or more favourable to the stockholders of the Company than the price available under the Offer to Purchase).

Offeror is the beneficial owner of 748,000 shares (approximately 24%) of the outstanding Common Stock of the Company. During the 60 days preceding July 24, 1973, Offeror purchased 292,000 of the shares on the New York Stock Exchange or Toronto Stock Exchange at prices ranging from \$20 3/4 per share to \$23 1/4 per share. The last such purchase was made on June 14, 1973.

Tender Offer to Purchase Common Stock of Texasgulf, Inc.

To the best of the knowledge of Offeror, none of the directors or officers of Offeror or their associates owns beneficially or has a right to acquire, directly or indirectly, any shares of Common Stock of the Company, nor to the best of the knowledge of Offeror has any of them effected any transactions therein during the past 60 days.

Offeror believes that no shares of Common Stock of the Company are owned by the Government or its departmental, agency and proprietary corporations ("Crown Corporations"), that no transactions were effected therein within the last 60 days and that, in any event, any ownership of or transactions in such shares by them are not, in the aggregate, material in relation to the number of shares of Common Stock of the Company in respect of which the Offer to Purchase is being made. In its quarterly report to shareholders for the quarter ended March 31, 1973, the Company stated that over 20% of its stock was owned by Canadians.

Neither Offeror, the Government, the Crown Corporations, nor any of the officers or directors of Offeror have any contracts, arrangements or understandings with any person with respect to any securities of the Company including, but not limited to, transfer of any such securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss or guarantees of profits, division of losses or profits, or the giving or withholding of proxies, except as described herein.

The names, business addresses and present principal occupations of the officers and directors of Offeror are as follows:

Directors: Laurent Beaudoin, Bombardier Limited, Valcourt, Quebec, President and Chief Executive Officer, Bombardier Limited, (Manufacturer of Recreational Vehicles); Rodolphe B. Casgrain, Suite 1705, 625 Dorchester Blvd. West, Montreal 101, Quebec, President & Managing Director, Casgrain & Company Limited, (Investment Dealer); Francois E. Cleyn, 4 Lorne Avenue, Huntingdon, Quebec, Chairman & President, Cleyn & Thibet Limited, (Manufacturers of Textiles); Pierre Cor, 876 4th Avenue, Quebec City, Quebec, President-Laiterie Laval Limited, (Manufacturer of Dairy Products); J. P. Gallagher, 706-7th Avenue, Calgary, Alberta, President and General Manager, Dome Petroleum Limited, (Exploration, production and transportation of oil and natural gas); Gordon F. Hughes, Ocean Company Limited, 50 Albert Street, Windsor, Nova Scotia, President, Ocean Company Limited, (Financial holding company); Douglas N. Kendall, Suite 1105, 21 King Street East, Toronto, Ontario, Chairman, Kenting Limited, (Transportation and related services to natural resource industry); Sydney Meislin, 7401 Newman Blvd., LaSalle 60, Quebec, President, Meislin Industries Ltd., (Highway transport); Hugh A. Martin, 1655 West Georgia St., Vancouver, B. C., President, Western Construction and Engineering Research Ltd., (Construction company); P. Hambleton McCalla, Florenceville, New Brunswick, Chairman, McCalla Foods Limited, (Processor of frozen foods); V. C. Y. McGregor, Suite 600, 550 Sherbrooke Street West, Montreal 111, Quebec, International Vice-President, Brotherhood of Railway, Airline and Shipbuilding Clerks, (Trade Union); J. H. Moore, Commerce Court, Toronto, Ontario M5H 1H7, President, Brascan Limited, (Holding company with public utility and other diverse interests); Maurice Morcan, Suite 1114, 100 University Ave., Toronto, Ontario, President, Geosearch Consultants Ltd., (Geological Consulting firm); Frederick W. Sellers, 325 Dawson Road, Winnipeg, Manitoba R2J 0S3, President, Spiroll Corporation Ltd., (Machinery Manufacturer); F. H. Sherman, Dominion Foundries & Steel Ltd., 1350 Burlington St. East, Hamilton, Ontario L8N 3T5, President & Chief Exec. Officer, Dominion Foundries & Steel Ltd., (Basic Steel Producer); Marie-Livia Thir, University of Quebec, Trois-Rivieres, Quebec, Vice Rector, University of Quebec, (Academic); J. N. Turvey, Interprovincial Steel & Pipe Corporation Ltd., Highway 6 North, Regina, Saskatchewan, President, Interprovincial Steel & Pipe Corporation Ltd., (Basic Steel Producer); Allan F. Waters, 1331 Yonge Street, Toronto, Ontario, President & General Manager, CHUM Limited, (Radio station operator).

Directors Ex Officio: J. P. Grandy, Department of Industry, Trade and Commerce, Tower "B," 112 Kent Street, Ottawa, Ontario K1A 0G5, Deputy Minister, Department of Industry, Trade and Commerce, (Government of Canada); S. S. Reisman, Department of Finance, 27th Floor, Place Bell Canada, 160 Elgin Street, Ottawa, Ontario K1A 0G3, Deputy Minister, Department of Finance, (Government of Canada).

Directors Who Are Also Officers: Marshall A. Crowe, Suite 901, 130 Albert Street, Ottawa, Ontario K1P 6C4, Chairman of the Board of the Offeror; H. Anthony Hampson, Suite 901, 130 Albert Street, Ottawa, Ontario K1P 6G4, President and Chief Executive Officer of the Offeror; Louis R. Desmarais, 759 Victoria Square, Montreal, Quebec, Vice Chairman of the Offeror, President, Power Corporation of Canada Limited, (Investment holding company), President, Canada Steamship Lines Limited, (Marine transportation and services).

Tender Offer to Purchase Common Stock of Texasgulf, Inc.

Officers Who Are Not Directors: Donald C. Morrison, 130 Albert Street, Suite 901, Ottawa, Ontario, Executive Vice-President of the Offeror; Marcel Cazavan, 130 Albert Street, Suite 901, Ottawa, Ontario, Vice-President of the Offeror; H. Hume Wright, 130 Albert Street, Suite 901, Ottawa, Ontario, Vice-President of the Offeror; Claude R. Marchand, 130 Albert Street, Suite 901, Ottawa, Ontario, Secretary and General Counsel of the Offeror; J. W. Blain, Toronto-Dominion Bank Tower, Toronto, Ontario, Partner, Messrs. McCarthy & McCarthy, Barristers and Solicitors, Assistant Secretary of the Offeror.

11. Miscellaneous. This Offer to Purchase is not being made to, nor will the Offeror accept tenders from, holders of shares of Common Stock in any state of the United States in which this Offer or the acceptance thereof would not be in compliance with the securities or blue sky laws of such state. In those jurisdictions where the securities laws require this Offer to be made by a licensed broker or dealer, this Offer is made on behalf of the Offeror by one or more registered brokers or dealers who are licensed under the laws of such jurisdictions.

This Offer to Purchase is not being made to, nor will the Offeror accept tenders from, holders of shares of Common Stock who are residents of Canada. Accordingly, no shares will be purchased hereunder from any shareholder if the information contained in the Letter of Tender submitted by that shareholder indicates that such shareholder is a Canadian resident.

The Offeror shall have the absolute right to reject any or all tenders not in proper form or to waive any irregularities or conditions of tender, and the Offeror's interpretation of the terms and conditions of this Offer to Purchase (including the Instructions on the Letter of Tender) will be final.

No dealer or other person has been authorized to give any information or make any representation on behalf of the Offeror other than as contained in this Offer and in the Letter of Tender and, if given or made, such information or representation must not be relied upon as having been authorized.

Questions or requests for assistance or for additional copies hereof and of the Letter of Tender may further be directed to the Dealer Manager, the Depositary, The Kissel-Blake Organization, Inc., or the stockholder's broker, dealer, bank or trust company. Properly executed facsimile copies of the Letter of Tender will be accepted. Telephone inquiries may be made by direct telephone call to: Loeb, Rhoades & Co., Syndicate Department (212) 539-4131.

The Letter of Tender and certificates for your shares should be sent by you, your broker or bank or trust company to the Depositary as follows:

SCHENKER TRUST COMPANY, Depositary

Mailbox Address
One State Street
New York, New York 10004
Attn: Corporate Securities Department

Delivery Address
One State Street
Sub Cellar 1
New York, New York 10004

The Selling Agent for this Offer to Purchase is:
THE KISSEL-BLAKE ORGANIZATION, INC.
101 Broadway, New York, N.Y. 10004
Tel.: (212) 44-6733

The Dealer Manager of this Offer to Purchase is:

Loeb, Rhoades & Co.
42 WALL STREET, New York, N.Y. 10005

US COURT OF APPEALS: SECOND DCIRCUIT

LOWENSCHUSS, et al,
Plaintiff-Appellants m

against

JAB KANE, et al,
Defendants-Appellees

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, James Steele, being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th Street, New York, New York
That on the 2nd day of October 1974 at
deponent served the annexed joint appendix upon

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 2nd
day of October 1974

James Steele
Print name beneath signature

JAMES STEELE

* Abrah

- * Milton Paulson-122 E. 42nd St., New York
- * Simpson, Thacher, & Barlett- 1 Battery Park Pl.
- * Sullivan & Cromwell- 48 Wall St.

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 6410050
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975